SBC/Ameritech's incentive to provide quality of service at least equivalent to the merged firm's retail operations or a benchmark standard. Moreover, both the OSS and the collocation provisions will reduce the cost of entry into SBC/Ameritech territories. These conditions make competition in SBC/Ameritech's region more likely, thereby offsetting in part the competitive threat that each Applicant posed to the other.

2. Mitigating Harm from Loss of Benchmarks

423. As indicated above, by removing a major incumbent LEC, the merger of SBC and Ameritech would result in fewer sources of diversity and experimentation at the holding company, operating company, and industry level from which regulators and competitors could draw comparisons particularly useful in implementing the 1996 Act's pro-competitive mandates. We doubt that any set of conditions could substitute fully for the loss of one of the few remaining major incumbent LEC benchmarks. The harm from such comparative practices analyses, however, to some extent is mitigated by conditions that require the spread of best practices throughout the merged firm's service areas or the reporting of information regarding the incumbent's networks and performance that is useful to regulators and competitors.

424. We anticipate that several conditions will require the merged firm to spread best practices throughout its region. Significantly, "best practices," as we use the phrase here, will be identified in full or in part by the Applicants' customers and regulators, not by SBC and Ameritech. Both the out-of-region and in-region most-favored nation requirements are designed explicitly to assure carriers some ability to obtain beneficial arrangements, whether specifically requested by SBC/Ameritech as an out-of-region competitor or simply offered by the firm in an in-region state, throughout the merged firm's 13-state area. With respect to OSS, SBC/Ameritech will establish uniform OSS interfaces and systems across its 13 in-region states that, in the Applicants' own words, "are based on the best practices of the two companies."[787] This commitment to implement OSS best practices offers assurance that the merged firm will take into account practices of certain operating companies that other carriers have found useful or beneficial in establishing uniform interfaces, enhancements and business requirements.

425. Another example of the spread of best practices concerns shared transport. Pursuant to the condition requiring the provision of shared transport in Ameritech territory, which Ameritech has vigorously resisted implementing in the past,[788] SBC/Ameritech has committed to implement and offer in the Ameritech states the same version of shared transport that SBC has implemented in Texas. Similarly, the merged firm will offer a Lifeline plan based on features of the Ameritech Ohio plan to each of the merged firm's in-region states. SBC/Ameritech's commitment to provide all advanced services through a separate affiliate, essentially adopting Ameritech's long-standing approach to advanced services, also represents a departure from SBC's former opposition to any such requirement.[789]

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787 SBC/Ameritech July 26 Reply Comments at 48.

788 *See supra* n. 741. *See also* Ameritech May 26 Comments, CC Docket Nos. 96-98, 95-185.

789 *See supra* at Section V.C.4.a) (Loss of Ameritech as Independent Holding Company).

426. The conditions also require SBC/Ameritech to continue participation in the NRIC, which issues periodic reports concerning the reliability of public telecommunications network services, and regularly compiles detailed lists of industry best practices designed to reduce the number and scope of network outages. Through its continued participation in the NRIC, we fully expect SBC/Ameritech to study and, to every extent possible, implement the industry best practices for network reliability. In this way, we anticipate that SBC/Ameritech will be able to, at a minimum, maintain a high state of reliability after the merger and take aggressive steps to address network reliability in those areas where the company may need improvement.

427. Aside from the spread of existing best practices, several conditions will help to offset the potential loss of future diversity and experimentation resulting from the merger. For example, addressing an issue that drew comments from several parties, SBC and Ameritech have agreed to conduct a trial with interested competitive LECs in five large cities to identify the procedures and associated costs required to provide carriers with access to LEC owned or controlled cabling behind a single point of interconnection within multi-dwelling unit premises. Similarly, although Ameritech previously had established separate affiliates to provide advanced services, the merged firm is subject to specific obligations under the separate affiliate structure that will result in a flow of information to federal and state regulators, as well as competitors, concerning the Applicants' provision of advanced services.

428. In addition to promoting experimentation and spreading best practices, the conditions also help ameliorate any potential loss of observable information to regulators and competitors. In particular, the Carrier-to-Carrier Performance Plan will generate valuable information for regulators and competitors for use in implementing and enforcing the Communications Act. The merged firm will also continue to report ARMIS data separately for each of its operating companies, and will now report such data on a quarterly basis. The requirement that the Applicants develop and file state-by-state service quality reports in accordance with the recommendations of the NARUC Technology Policy Subgroup will facilitate comparative practices analysis by providing additional data for this Commission and state commissions in carrying out their statutory responsibilities and in detecting potential violations of the Communications Act. The Applicants also are obligated under the conditions to provide quarterly state-specific service quality reports regarding the quality of services provided to interexchange carriers, and to file a statement of the cost savings associated with the merger.

3. Mitigating Harm from Potential Increased Discrimination

429. We find that several commitments will alleviate the concern that the merged firm will use its combined size and market power to discriminate more effectively against its rivals in its in-region markets for local services as well as advanced services. As stated by one commenter, an effective means of ensuring that the merged firm cannot engage in anticompetitive conduct against smaller entrants is to "make sure that the company is already

permitting effective entry into the SBC and Ameritech regions."[790] The conditions that we adopt today are carefully targeted at the types of discrimination the merger was otherwise most likely to engender. Moreover, they substantially reduce entry barriers to the merged entity's region.

430. The combined entity's incentive to discriminate, stemming from its larger geographic footprint, is especially likely, if left unchecked, to translate into an ability to discriminate against the provision of advanced services.[791] The requirements that the merged firm provide such services through a separate affiliate, and comply with reporting and performance obligations, decreases the ability of SBC/Ameritech to discriminate successfully, and thereby neutralizes some of SBC/Ameritech's increased incentive to discriminate with respect to advanced services. Significantly, the merged entity will have to treat rival providers of advanced services the same way that it treats its own separate advanced services affiliate.

431. The Applicants' commitments to establish uniform advanced services and other OSS interfaces also should reduce somewhat the costs and other barriers that local or advanced services competitors face in entering multiple markets within the SBC and Ameritech regions. This uniformity should also reduce the merged firm's ability to impair a national, or regional, competitive LEC's strategy that is at the heart of the merged firm's increased incentive to discriminate.[792] We expect that other conditions, most notably the collocation compliance and surrogate line sharing discount, also will reduce the costs and uncertainty of providing advanced services in SBC/Ameritech's region, and thereby remedy to a certain extent any effects of increased discrimination for national competitive LEC entrants.

432. The Carrier-to-Carrier Performance Plan also partially alleviates the Applicants' increased incentive and ability to discriminate against rivals following the merger. By requiring the merged firm to report results of 20 performance measures, and achieve the agreed-upon standard or voluntarily make incentive payments, the plan provides heightened incentive for the company not to discriminate in ways that would be detected through the measures. Competing carriers operating in or contemplating entry into SBC/Ameritech territory will have an increased measure of confidence that the company will not engage in discrimination that would be detected through such measures. If the results reveal unequal treatment, the voluntary payment scheme, as NorthPoint notes, will "create a direct economic incentive for SBC/Ameritech to cure performance problems quickly."[793]

433. The Carrier-to-Carrier Performance Plan is specifically designed to permit monitoring for discriminatory conduct in SBC/Ameritech's provision of elements and services utilized by the incumbent or other carriers in providing advanced services. Certain measures, such as the average installation interval for DSL loops (performance measure # 8) and the average response time for loop makeup information (performance measure # 9), were designed

790 CoreComm Comments at 17.

791 *See supra* at Section V.D.2.a) (Advanced Services).

792 *See supra* at Section V.D.2.a) (Circuit-Switched Local Exchange Services).

793 NorthPoint July 19 Comments at 5.

specifically to address the needs of advanced services providers. For many of the other measures, data will be reported distinctly for DSL loops. The availability of this information will assist entities that are contemplating providing advanced services in the SBC/Ameritech 13-state region, as well as helping carriers already operating in the region to monitor and address any potential increased discrimination.

434. As explained above, with SBC's new access to customer accounts in Ameritech's region (*e.g.*, Dallas business customers with branch offices in Chicago), and vice-versa, the merged firm gains an advantage in servicing multi-location business customers. Allowing competitors to import most-favored nation arrangements across SBC-Ameritech's in-region states helps to safeguard against this increased potential for discrimination while reducing the merged firm's advantage of servicing multi-location customers.[794]

435. The enforcement mechanisms contained in these conditions also will aid in the detection of discriminatory behavior by SBC/Ameritech. In particular, the conditions require the more thorough type of audit, an agreed-upon procedures engagement, for the separate advanced services affiliate provisions. Like the section 272(d) audit, the independent auditor will conduct a systematic and thorough examination into SBC/Ameritech's compliance with the structural, transactional, nondiscrimination and other requirements of the separate advanced services affiliate.

4. Additional Benefits from Conditions

436. While these conditions mitigate, in many important ways, the potential public interest harms of the proposed transaction, we also find that the conditions will result in affirmative public interest benefits that tip the public interest balance of the proposed transaction in the Applicants' favor. Collectively, these conditions will, we believe, create a powerful momentum for increasing competition and choice in telecommunications markets inside and outside SBC's and Ameritech's territories.

437. As an initial matter, nearly all of the obligations under the conditions apply throughout SBC's and Ameritech's 13 in-region states, and others even extend to markets outside of the companies' traditional service areas. Because our public interest analysis is not limited to potential public benefit within a select geographic area or market, but also considers potential public interest benefits of applying conditions such as those imposed in this Order to a wider area, the breadth of the conditions helps the Applicants in carrying their burden of demonstrating how the merger advances competition.

438. We also find it significant that the conditions in general will last for a 36-month period. As addressed in the conditions, the duration of each commitment is tied not to our approval or the merger closing date, but to the initiation of the benefit of the condition. In other words, the commitments are designed to provide 36 months of benefit once SBC/Ameritech's

[794] *See* Consumer Coalition July 19 Comments, Affidavit of Mark N. Cooper, at 14.

obligations take effect. In the fast-changing world of telecommunications industries, these commitments, in our judgment, will last for a sufficient period to have real impact, but not so long as to threaten imposing obsolete responses to future issues.

439. *Fostering Out-of-Territory Competitive Entry.* We described earlier the Applicants' post-merger National-Local Strategy and why we could not regard its undoubted benefits as merger-specific. These conditions do not alter the basic fact that the parties do not need to merge in order to form out-of-region competitive LECs. The conditions do, however, greatly increase both the likelihood and the magnitude of a post-merger out-of-region entry strategy. These certainly enhance the public interest.

440. *Lower Entry Barriers for Residential Competition.* In broad terms, we anticipate that the conditions will prove beneficial in jumpstarting residential competition by lowering entry barriers for residential competition. The carrier-to-carrier promotions are specifically designed to induce more entry into residential markets quickly. The Applicants' commitments regarding carrier-to-carrier promotions, collocation, OSS, and multi-state interconnection agreements will, in our judgment, greatly reduce the costs of entry over the long run. In addition, the commitment to reform the process of cabling new multi-tenant dwellings and business properties will increase access to customers by competitors not otherwise relying on the incumbent's wireline network.

441. *Accelerating Advanced Services Deployment.* Several conditions are aimed at increasing the availability of and broadening choices for advanced services for all Americans. The extensive commitments regarding advanced services all help to attain a single overriding goal: to encourage entry into the provision of advanced services by numerous firms, as well as the Applicants, while protecting against the risk that SBC/Ameritech might cripple these services in their infancy by discriminating against rival advanced services providers. The provisions for equitable sharing of loop information, for a surrogate line-sharing discount, for a separate affiliate for the Applicants' provision of advanced services, and for a new, open and nondiscriminatory OSS system will reduce the costs, including the risks, of entering these markets.

442. *Improving Service to Residential and Low-Income Consumers.* Low-income consumers, in rural and urban areas alike, will realize direct benefits from the enhanced Lifeline plans offered to them and from the assurance that they will share in the benefits of new advanced services offerings. Moreover, through the Applicants' additional service quality reporting, the Commission, states, and consumers will have information needed to monitor the merged firm's service quality on a timely basis.

D. Other Requested Conditions or Modifications to Proffered Conditions

443. Several commenters suggest additional conditions or modifications to the Applicants' package of voluntary proposed conditions. To the extent that a party requested a

condition that we do not impose today, or suggested a change in the Applicants' proposal that we did not incorporate, we explain our rationale for declining the request below. We begin by discussing the separate advanced services affiliate, and whether the structure set forth in the conditions would render it a "successor or assign" of the incumbent LEC.

1. Separate Affiliate for Advanced Services

444. Several commenters question whether the separate advanced services affiliate structure described in the Applicants' July filing contains adequate safeguards to ensure that the SBC/Ameritech advanced services affiliate will function separately from the incumbent like any other competitive LEC.[795] Although commenters are divided over the merits of the separate affiliate condition, we find that SBC/Ameritech's provision of advanced services through a separate affiliate will spur the deployment of advanced services by all entities. We conclude that the separate affiliate structure contained in the conditions that we adopt today, which has changed significantly since the July filing, will ensure that advanced services are deployed efficiently. At the same time, the structure will safeguard against SBC/Ameritech leveraging its control over certain bottleneck facilities into the nascent advanced services market.

445. As discussed below, on the basis of the conditions as written, we find that the affiliate structure creates a rebuttable presumption that an SBC/Ameritech advanced services affiliate will not be a "successor or assign" of an incumbent LEC under section 251(h)(1) or a BOC under section 3(4)(B) of the Act.[796] At the same time, however, we note that if an SBC/Ameritech incumbent LEC and its advanced services affiliate behave in a manner inconsistent with the intent of the conditions or engage in activities beyond those expressly permitted in the conditions, the company bears the risk that the affiliate will be deemed a successor or assign of the incumbent LEC and, therefore, subject to incumbent LEC regulation under section 251(c). Accordingly, if an SBC/Ameritech advanced services affiliate is found to be a successor or assign[797] based on activities that are expressly permitted in these conditions, then, nine months after such a finding becomes final and non-appealable, SBC/Ameritech will no longer be obligated under the conditions to provide all advanced services through a separate affiliate, although it may choose to do so, but will continue to bear certain obligations.[798] If, however, the separate advanced services affiliate is deemed to be a successor or assign based substantially on conduct by or between an SBC/Ameritech incumbent and its affiliate that was

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795 *See, e.g.*, CompTel July 19 Comments at 4; CoreComm July 22 Comments at 15-16; MCI WorldCom July 19 Comments at 42-46 (suggesting, *inter alia*, that the Applicants provide advanced services through affiliates that meet all section 272 separation requirements before merger consummation, and that they specify the charges for services, elements and features that the affiliate can purchase from the incumbent).

796 *See* 47 U.S.C. § 251(h)(1); 47 U.S.C. § 153(4)(B).

797 We do not address in this proceeding the potential obligations or requirements with respect to third parties that may be imposed on SBC/Ameritech in the event that its advanced services affiliate is found to be a successor or assign.

798 We note that, after that time, if SBC/Ameritech decides to no longer provide advanced services through a separate affiliate in a particular state, it will provide them through a separate division that will comply with certain obligations until 48 months after the merger closing date.

not expressly permitted by these conditions, then SBC/Ameritech shall continue providing advanced services through the affiliate, operating as a successor or assign, for the full duration of the condition.

a) Section 251(h)(1) Statutory Framework

446. In the *Advanced Services Order and NPRM*,[799] the Commission recognized that a determination as to whether a carrier is an incumbent LEC is based on the statutory definition set forth in section 251(h). As discussed below, section 251(h)(1) of the Act defines an incumbent local exchange carrier as a local exchange carrier[800] that was providing local exchange service as of the date of enactment of the 1996 Act and was a member of an exchange carrier association on such date,[801] or that is a "successor or assign" of such a carrier.[802] Section 251(h)(2) provides that the Commission may deem, by rule, that a LEC is comparable to, and therefore should be treated as, an incumbent if the following three criteria are met: (1) the LEC occupies a position in the market for telephone exchange service comparable to an incumbent LEC; (2) the LEC has "substantially replaced" an incumbent; and (3) treating the LEC as an incumbent "is consistent with the public interest, convenience, and necessity and the purposes of [section 251]."[803] Furthermore, section 3(4)(B) of the Act defines a "Bell Operating Company" as including "any successor or assign of any such company that provides wireline telephone exchange service."[804] Thus, under the Act, a "successor or assign" of an incumbent LEC, or in this case a BOC, will be subject to the obligations imposed upon incumbent LECs in section 251(c).

447. We recognize that one interpretation of section 251(h)(1) is that, in order to fall within its definition, two conditions must be met: (1) the LEC must have provided service in the area as of February 8, 1996;[805] and (2) it must have been a member of NECA on that date[806] or became a successor or assign of a NECA member after that date.[807] Under this interpretation, an entity that was a successor or assign of a NECA member would not be deemed an incumbent LEC under 251(h)(1) unless that entity itself was also providing local exchange service in the

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799 *Advanced Services Order and NPRM*, 13 FCC Rcd at 24052, para. 89. *See also* Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order, CC Docket Nos. 98-11 *et al.*, *Public Notice*, DA 99-1853 (rel. Sept. 9, 1999).

800 Section 3(26) of the Act defines a local exchange carrier as "[a]ny person that is engaged in the provision of telephone exchange service or exchange access . . . ." 47 U.S.C. § 153(26).

801 Specifically, the Act refers to a LEC that was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations. *See* 47 U.S.C. §251(h)(1)(B)(i). The referenced association is the National Exchange Carrier Association (NECA), which prepares and files access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements. *See* 47 C.F.R. § 69.601. Under the Commission's rules, NECA also is responsible for the collection and distribution of access charge revenues. *See* 47 C.F.R. § 69.603.

802 47 U.S.C. § 251(h)(1).

803 47 U.S.C. § 251(h)(2).

804 47 U.S.C. § 153(4)(B).

805 47 U.S.C. § 251(h)(1)(A).

806 47 U.S.C. § 251(h)(1)(B)(i).

807 47 U.S.C. § 251(h)(1)(B)(ii).

NECA member's area on February 6, 1996.[808] In other words, an affiliate established after the date of enactment, regardless of whether it replaces or substantially continues the operations of the incumbent, would never meet the definition of an incumbent LEC under 251(h)(1) under this interpretation because it was not in existence, thus could not have been providing telephone exchange service, as of February 8, 1996.[809] We find that this formulation appears to distort the notion of "successor or assign" that is at the heart of the statutory provision.[810]

448. We find the more reasonable interpretation of section 251(h)(1) to mean that an entity may become an incumbent LEC by being a successor or assign of a LEC[811] that, as of February 8, 1996, was providing local exchange service in a particular area[812] and was a member of NECA,[813] even if that entity was not itself providing local exchange service in the area or a member of NECA as of that date.[814] This interpretation of "successor and assign" is not only more consistent with the goals of section 251, but conforms more closely to the traditional notion of "successor or assign."[815] We therefore decline to follow the approach set forth in *MCI Telecomm. Corp.*,[816] as we believe such interpretation produces a result plainly at variance with the policy of the legislation as a whole.[817]

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808 *See MCI Telecommunications Corp. v. The Southern New England Telephone Co.*, 27 F.Supp.2d 326, 336-37 (D.Conn. 1998) (*MCI Telecomm. Corp.*) (concluding that, even if a carrier is a successor or assign of an incumbent under section 251(h)(1)(B)(ii), the carrier cannot be deemed an incumbent because it did not provide service in the area on February 8, 1996, and therefore fails to satisfy section 251(h)(1)(A)).

809 This interpretation also implies that an entity that purchases an incumbent LEC would be deemed an incumbent only if that entity had also been providing local exchange service in the incumbent's area as of the date of enactment – a situation that we believe would rarely be met because local exchange service in most areas was provided solely by the incumbent as of that date.

810 *See MCI Telecomm. Corp.*, 27 F.Supp.2d at 337 (recognizing that the literal interpretation of section 251(h)(1) "appears to be an unusual formulation for a statutory provision purporting to address successors or assigns," and "gives the appearance of allowing for a large loophole").

811 47 U.S.C. § 251(h)(1)(B)(ii).

812 47 U.S.C. § 251(h)(1)(A).

813 47 U.S.C. § 251(h)(1)(B)(i).

814 We also believe that this approach is consistent with section 251(h)(2).

815 We note that the Applicants have presumed this interpretation of section 251(h)(1) in the instant proceeding. *See* Letter from Michael K. Kellogg, Counsel for SBC, Kellogg, Huber, Hansen, Todd & Evans, to Christopher J. Wright, General Counsel, FCC, CC Docket No. 98-141, at 2 (filed June 25, 1999) (SBC June 25 *Ex Parte*) (stating that section 251(h) defines an incumbent LEC "as a carrier that 'on February 8, 1996, provided telephone exchange service' and refers to 'successor[s]' and 'assign[s]' of such a carrier.") (emphasis omitted)); Letter from Michael K. Kellogg, Counsel for SBC, Kellogg, Huber, Hansen, Todd & Evans, to Christopher J. Wright, General Counsel, FCC, CC Docket No. 98-141, at 5 (filed Sept. 9, 1999) (SBC June 25 *Ex Parte*) (same).

816 *See supra* n. 810.

817 *See, e.g., United States v. American Trucking Assocs.*, 310 U.S. 534, 543 (1967); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454-455 (1989) ("Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope," including the circumstances of the enactment of a particular legislation); *United States v. Ron Pair Enterprises, Inc.*, 498 U.S. 235, 242 (1989) (where "the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters . . . the intention of the drafters, rather than the strict language, controls."); *Environmental Defense Fund v. Environmental Protection Agency*, 82 F.3d 451, 468-69 (D.C. Cir.), *amended on other grounds*, 92 F.3d 1209 (D.C. Cir. 1996) ("Because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to Congress's purpose"). *See*

449. In this proceeding, therefore, we must examine whether the SBC/Ameritech advanced services affiliate that will be created and operated in accordance with the conditions would be deemed a successor or assign of the SBC/Ameritech incumbent LEC, which was providing service and was a member of NECA as of February 8, 1996. As discussed below, we reach a rebuttable presumption that the SBC/Ameritech advanced services affiliate should not be deemed a successor or assign of an incumbent LEC under section 251(h)(1).

b) Legal Analysis of "Successor or Assign"

450. As an initial matter, we note that the Commission has never determined the circumstances under which one entity will be considered a successor or assign of another under section 251(h)(1) or section 3(4) of the Act. This issue is, therefore, a matter of first impression for the Commission. In order to provide guidance to the Applicants regarding the interconnection obligations that will be required of the advanced services affiliate, we analyze section 251(h)(1) as it applies to the affiliate structure set forth in the conditions.

451. To determine whether an advanced services affiliate would be deemed an incumbent LEC pursuant to section 251(h)(1), or a BOC pursuant to section 3(4), we first look to the text of the statute to determine the circumstances under which an entity would become a successor or assign. Neither the Act nor its legislative history defines the terms "successor or assign" in either context. Employing our traditional tools of statutory construction, therefore, we look to the purposes of the Act, and section 251 in particular, to determine a reasonable meaning of the terms in their context.[818] We also examine case law for guidance on how federal courts have interpreted these terms.

452. One of the fundamental goals of the Act is to promote innovation and investment in the telecommunications marketplace by all participants, both incumbents and new entrants, and to stimulate competition for all services, including advanced services.[819] We therefore interpret the terms "successor or assign" as used in section 251 in a manner that promotes, rather than frustrates, the pro-competitive and innovation-enhancing purposes of that section and section 706(a) of the 1996 Act. The primary pro-competitive objective of section 251 is to open

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also Guam Public Utilities Commission, CCB Pol. 96-18, CC Docket No. 97-134, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, 6942-43, at para. 29-30 (1997); *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers Under Section 251(h)(2) of the Communications Act*, CC Docket No. 97-134, Report and Order, FCC 98-163, 1998 WL 400007 (rel. Jul. 20, 1998).

[818] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

[819] *See* Telecommunications Act of 1996, Pub.L. No. 104-104, Purpose Statement, 110 Stat. 56, 56 (1996) (stating that the broad purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."). Section 706(a) of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

the local exchange market to competition in all services to ensure that consumers reap the benefits of broad-based and long-lasting competition. In particular, section 251 requires all incumbent LECs to provide nondiscriminatory access to their network facilities,[820] thereby allowing competing carriers to enter local markets by purchasing parts of the incumbent's network, and to allow resale of their services at wholesale rates. Section 251 also facilitates investment and deployment of innovative technologies by encouraging new carriers to enter markets previously foreclosed to them with a wide array of diverse services.[821] Thus, we must interpret the terms "successor or assign" in a manner that furthers increased competition among various service providers, while encouraging investment in new services and deployment of innovative technologies.

453. Typically, a successor or assign legal analysis is triggered after an entity ceases to exist.[822] For example, when an existing entity creates another entity to replace it, it may be appropriate to consider whether the new entity has "stepped into the shoes" of the previously existing entity. In our context, however, we must assess circumstances under which an incumbent LEC may develop a new line of business in a new, less regulated entity, or transfer a nascent business to such an entity, while continuing other core lines of business in the incumbent LEC. Essentially, we must ensure that the existing entity has ceded sufficient control of the new entity so that we are able to recognize the new entity as its own operation.

454. We recognize, as the Supreme Court confirmed in *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, that a determination as to whether an affiliate is a successor or assign is ultimately fact-based, and the terms take their meaning from the particular legal context in which they are used.[823] In considering the particular facts and the legal context, however, courts generally have looked for "substantial continuity" between two companies such that one entity steps into the shoes of, or replaces, another entity.[824] In particular, in the labor law case of *Fall River Dyeing & Finishing Corp. v. NLRB*, the Supreme Court, in determining whether

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820 *See Local Competition Order*, 11 FCC Rcd at 15506, para. 4.

821 *See also* Section 706(a) of the 1996 Act, codified at 47 U.S.C. § 157 note.

822 *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (*Fall River Dyeing*).

823 *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 264 n.9 (1974) (stating that determinations about successorship must be based on "the facts of each case and the particular legal obligation which is at issue" and that "there is and can be no single definition of 'successor' which is applicable in every legal context."). *See also* SBC June 25 *Ex Parte* at 3; SBC Sept. 9 *Ex Parte* at 6 (stating that determinations about successorship are fact-based).

824 *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964) (concluding that a successor corporation could be compelled to arbitrate under a collective-bargaining agreement if there was "substantial continuity of identity in the business enterprise"); *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 182 n.5 (1973) (referring to the general rule of corporate liability under which a successor corporation could be liable for the debts or liabilities of its predecessor if, among other tests, the successor corporation is "merely a continuation of the selling corporation"). *See also Atchison Casting Corp. v. Dofasco Inc.*, 889 F. Supp. 1445, 1448-49 (D. Kan. 1995) (*quoting Blacks Law Dictionary* 1431 (6th ed. 1990)) (addressing allegations of breach of contract and fraud for a contract that bound "successors or assigns" of the predecessor corporation, and stating that "the term [successor] ordinarily means 'another corporation which through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.'").

substantial continuity existed between two companies such that one company was the successor of another, focused on whether the company had "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."[825]

455. For the instant inquiry, we find it instructive to consider the affiliate structure that Congress established in another part of the Act to accomplish similar policy objectives. In particular, we are guided by the affiliate structure chosen by Congress in section 272. Section 272 requires BOCs to provide certain manufacturing activities and origination of certain interLATA telecommunications services and interLATA information services only through a separate affiliate.[826] Congress set forth certain structural and transactional safeguards, as well as nondiscrimination and audit requirements, to prevent a BOC from leveraging its market power in the local market into adjacent, more competitive markets in an anticompetitive manner.[827] A section 272 affiliate must, for example, operate independently from the BOC; maintain separate books, records, and accounts; have separate officers, directors, and employees; not obtain credit recourse to the BOC; and conduct all transactions on an arm's length basis, reduced to writing, and available for public inspection.[828] Although we are not bound by section 272 here, the underlying policy rationales of separation in that context, as discussed in prior Commission orders, are similar to those in the instant context.[829] Indeed, in this case, consideration of section 272's requirements will enable us to avoid re-inventing the wheel with respect to previous Commission consideration of separation criteria.

456. We find that a separate affiliate structure for advanced services should not be more stringent than necessary to effectuate the overriding statutory purpose of promoting local competition and the deployment of advanced services by all carriers. While section 272's intent, to prevent an incumbent from leveraging market power in an anticompetitive manner and thereby frustrating the purposes of the Act, has some bearing on our analysis of the degree of

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825 *Fall River Dyeing*, 482 U.S. at 43 (citation omitted). We also note that, in an analogous context involving regulated industries, courts have looked to whether the statutory purpose could be easily frustrated through the use of separate corporate entities to determine whether it is appropriate to "pierce the corporate veil." *See, e.g., General Telephone Co. of the Southwest v. U.S.*, 449 F.2d 846, 855 (5th Cir. 1971) (stating that "where the statutory purpose could [] be easily frustrated through the use of separate corporate entities, the Commission is entitled to look through the corporate form and treat the separate affiliate as one and the same for purposes of regulation"); *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320 (5th Cir. 1993) (*Transcontinental Gas*) (same); *MCI Telecommunications Corp. v. O'Brien Marketing, Inc.*, 913 F. Supp. 1536, 1541 (S.D. Fla. 1995) (stating that courts will look closely at the purpose of the federal statute involved in applying the federal rule that a corporate entity may be disregarded in the interests of public convenience, fairness, and equity).

826 *See* 47 U.S.C. § 272(a).

827 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21910, para. 6.

828 *See* 47 U.S.C. § 272(b).

829 For example, one purpose of section 272's structural and nondiscrimination safeguards is to ensure that competitors of the BOC's section 272 affiliate have access to essential inputs for the provision of local services on terms at least as favorable as those provided by the BOC to its affiliate. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913, para. 13. A similar rationale applies here with respect to access to those inputs by competitors of SBC/Ameritech's advanced services affiliate.

separation between the SBC/Ameritech incumbent and its advanced services affiliate, other considerations are also present in the context of advanced services.[830] In particular, the Commission has an affirmative duty to encourage the rapid deployment of advanced services pursuant to section 706(a) of the 1996 Act.[831] The conditions therefore attempt to strike a balance that ensures that the separation requirements and safeguards are not outweighed by countervailing burdens that may tend to stifle the deployment of innovative technologies. While we are concerned that, to not be deemed an incumbent LEC, section 251's purposes require a degree of separation between an incumbent LEC and its advanced services affiliate, we also seek to preserve, if possible, innovative business structures and certain economies of scale and scope that will spur rapid deployment of advanced services by all carriers, as specifically envisioned by Congress.

457. Based on the case law and goals of the 1996 Act, and guided by the separation principles established by Congress in section 272, we conclude that, in determining whether an advanced services affiliate is a successor or assign of an incumbent LEC, we must consider whether, given the totality of the circumstances, "substantial continuity" exists between the incumbent LEC and the affiliate. In order to ensure that there is no substantial continuity between an incumbent and its advanced services affiliate, we look for the presence of certain indicia. Specifically, we evaluate whether: (1) there is identifiable physical separation between the entities; (2) the incumbent LEC has not transferred to its affiliate substantial assets or assets that are necessary for the continuation of the incumbent's traditional business operations;[832] (3) transactions between the incumbent and affiliate are conducted at arms-length and are transparent; and (4) the affiliate does not derive unfair advantage from the incumbent.[833] This approach is intended to ensure that an advanced services affiliate is not, in effect, standing in the shoes of an incumbent LEC and therefore rendered a "successor or assign" of the incumbent. If, for example, the affiliate's operations become too intertwined with the incumbent, thereby frustrating the pro-competitive purposes of section 251, the incumbent would be in a position to evade its obligations under section 251(c). We evaluate whether these indicia are present in the SBC/Ameritech advanced services affiliate structure below.

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[830] Using section 272 safeguards as guidance in this case may result in efficiencies for SBC/Ameritech. For example, SBC/Ameritech may, if it chooses, provide all advanced services through an already existing section 272 affiliate, or, in contemplation of receiving authority to provide in-region, interLATA services in a particular state, transition an advanced services affiliate created under these conditions into a section 272 affiliate so that, upon such approval, it can provide both intraLATA and interLATA advanced services through that affiliate.

[831] *See* Pub.L. 104-104, Title VII, § 706(a), Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

[832] *See Fall River Dyeing*, 482 U.S. at 43 (*quoting Golden State Bottling Co.*, 414 U.S. at 184) (finding that a determination as to whether a new company is the successor of the old requires an examination of whether the new company has "acquired substantial assets of its predecessor and continued without interruption or substantial change, the predecessor's business operations").

[833] *See generally, Transcontinental Gas*, 998 F.2d at 1320 (finding that, because a regulated entity was using its subsidiary to engage in "undue" discrimination, thereby frustrating the statutory purpose, FERC correctly looked behind the corporate form and treated the subsidiary and the regulated entity as one and the same for purposes of regulation).

c) Successor or Assign Analysis Applied to SBC/Ameritech Advanced Services Affiliates

458. We expect that, on the basis of the conditions as written, there will be no substantial continuity between the SBC/Ameritech incumbent LEC and its advanced services affiliate. Accordingly, we find that a rebuttable presumption is established that SBC/Ameritech's advanced services affiliate will not be a "successor or assign" of an incumbent LEC[834] or a BOC,[835] and therefore not be subject to incumbent LEC regulation under section 251.[836] Our conclusion, however, is a rebuttable presumption based exclusively on our analysis of the permitted activities described in the conditions. As discussed above, a successor or assign analysis is ultimately fact-based,[837] and, at this time, SBC/Ameritech's advanced services affiliate has yet to engage in actual transactions with the incumbent or establish a course of conduct that will shed light on the degree of continuity. We do not yet know, for example, whether SBC/Ameritech will choose to lessen the risk that its advanced services affiliate will be deemed a successor or assign by adhering to a more stringent structural separation model than that outlined in the conditions.[838] We assume, however, for the purposes of the instant discussion, that SBC/Ameritech and its affiliates will conduct their operations by engaging in all of the activities permitted in the conditions.

459. Commenters urge us to require SBC/Ameritech to provide advanced services through a separate affiliate that complies fully with the structural and transactional requirements

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834 *See* 47 U.S.C. § 251(h)(1)(B)(ii) (successor or assign of incumbent LEC). *See also* 47 U.S.C. § 251(h)(2) (treating comparable carriers as incumbents). We note that because we presume that the SBC/Ameritech advanced services affiliate is not a successor or assign, it can also benefit from a presumption of nondominance, which provides the affiliate more flexibility to price its services in a competitive manner. The separation requirements and safeguards that prevent the advanced services affiliate from being a successor or assign of an incumbent also are likely to prevent an incumbent from leveraging its market power in the local market through an affiliate to gain market power in the advanced services market. The affiliate, therefore, can provide advanced services as a nondominant carrier, while the nascent market for advanced services can continue to grow in a competitive fashion, protected from anticompetitive behavior.

835 *See* 47 U.S.C. § 153(4)(B) (successor or assign of a BOC).

836 We disagree with those commenters that claim that, simply through the creation of the advanced services affiliate, SBC and Ameritech will evade section 251 obligations, namely the obligation of an incumbent LEC to open and unbundle its network. *See* AT&T July 19 Comments, App. A at 56; MCI WorldCom July 19 Comments at 41; Sprint July 19 Comments at 21. The condition does not alter the obligations of an SBC/Ameritech incumbent LEC under section 251 and Commission rules. Assuming that the separate advanced services affiliate adheres to the conditions and does not act in such a way as to be deemed a successor or assign of an incumbent LEC, it will not be subject to section 251(c) requirements. For this reason, we decline to require the separate advanced services affiliate to make its services available for resale under 47 U.S.C. § 251(c)(4). *See* CoreComm July 22 Comments at 13.

837 *See* SBC June 25 *Ex Parte* at 3; SBC Sept. 9 *Ex Parte* at 6 (stating that determinations about successorship are fact-based).

838 To the extent that SBC/Ameritech chooses to adhere more closely to section 272, which contains Congress' vision of a structurally separate BOC affiliate for the provision of certain specified services, SBC/Ameritech is assured more certainty that its affiliate would not be deemed to be a successor or assign.

of section 272.[839] As an initial matter, we note that section 272, by its terms, applies only to manufacturing activities, in-region originating interLATA services, and interLATA information services.[840] Accordingly, the structure of an SBC/Ameritech affiliate that provides advanced services need not be dictated by section 272's framework.[841]

460. The Applicants' proposal nonetheless adheres to most of the structural and transactional requirements of sections 272(b), (c), (e), and (g), as interpreted by the Commission. Deviations from these requirements are expressly set forth in the description of activities permitted between the SBC/Ameritech incumbent LEC and its advanced services affiliate. Under the conditions, the separate advanced services affiliate will be permitted: (1) to engage in joint marketing with the SBC/Ameritech incumbent on an exclusive basis, which includes customer contacts up to and including the sale (*i.e.*, the incumbent may perform advanced services customer inquiries, sales, and order-taking); (2) to engage in certain customer care activities with the incumbent on an exclusive basis (*i.e.*, the incumbent may notify customers of service order progress, respond to customer inquiries regarding the status of an order, change customer account information, and receive customer complaints other than those regarding receipt and isolation of trouble); (3) to use the incumbent's brand name on an exclusive basis; (4) to obtain billing and collection services from the incumbent on a nondiscriminatory basis; (5) to obtain operation, installation and maintenance (OI&M) services from the incumbent on a nondiscriminatory basis; (6) to receive, within a limited grace period, from the incumbent an initial transfer of assets used to provide advanced services; and (7) to locate employees in the same buildings and on the same floors as employees of the incumbent, provided that the underlying building facilities are owned or leased by the affiliate. In addition, the conditions permit the SBC/Ameritech incumbent to perform certain activities on behalf of its affiliate on an exclusive basis for the period of time during which SBC/Ameritech transitions to this separate affiliate structure. Specifically, for a limited period, SBC/Ameritech may provide network planning, engineering, design or assignment services associated with advanced services to its affiliate, and receive and isolate troubles affecting an advanced services customer on behalf of the affiliate. Additionally, the SBC/Ameritech incumbent is permitted to line share with its advanced services affiliate on an exclusive basis until it provides line sharing to unaffiliated providers of advanced services.

461. Using the indicia outlined above, we find that, assuming the SBC/Ameritech advanced services affiliate strictly adheres to the structure set forth in the conditions, or to a more stringent separation structure, a rebuttable presumption is established that there will be no substantial continuity between the SBC/Ameritech incumbent and its advanced services affiliate

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[839] *See, e.g.*, ALTS July 19 Comments at 18-20; AT&T July 19 Comments, App. A at 57-58, 61; ALTS July 19 Comments at 19; CompTel July 19 Comments at 22; MCI WorldCom July 19 Comments at 42; Sprint July 19 Comments at 24-25.

[840] *See* 47 U.S.C. § 272(a)(2) (including information services other than electronic publishing and alarm monitoring services).

[841] We note, however, that once SBC/Ameritech receives authority to provide in-region, interLATA service in a particular state, it must provide all interLATA advanced services in that state through a section 272 affiliate. *See* 47 U.S.C. § 272(a).

and that the affiliate will thus not be a successor or assign of the incumbent LEC.[842] We believe that the affiliate structure set forth in the conditions will ensure that an SBC/Ameritech advanced services affiliate occupies a position in the market comparable not to an incumbent, but rather to a non-incumbent advanced services competitors.

462. *Identifiable Physical Separation.* We find that SBC/Ameritech's compliance with the structural requirements of section 272(b)[843] ensures an identifiable level of physical separation between the incumbent and its affiliate. Under these rules, the incumbent and its affiliate will not jointly own transmission and switching facilities, nor the buildings and land where switching and transmission facilities are located.[844] The affiliate will also not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent.[845] Additionally, the advanced services affiliate will maintain separate officers, directors, and employees from the incumbent.[846] Although the SBC/Ameritech advanced services affiliate is permitted to locate employees in the same buildings and on the same floor as the incumbent's employees, the conditions contain additional restrictions that mitigate the risk of abuse or malfeasance in this case. Despite the potential proximity, the affiliate must use only the same OSS systems, processes and procedures that are available to unaffiliated entities, and the incumbent's employees will conduct transactions with the affiliate in the same manner in which they conduct transactions with unaffiliated entities. For example, in communicating with the affiliate, the incumbent's employees must use the same mode of communication that they use with unaffiliated carriers (*e.g.*, phone calls or email). Furthermore, complying with the Commission's accounting safeguards protects ratepayers of SBC/Ameritech's regulated services from bearing the risks and costs associated with the affiliate.

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842 We note that the affiliate would remain subject to the general duties of telecommunications carriers in section 251(a) and the obligations of all local exchange carriers in section 251(b).

843 We recognize that SBC/Ameritech is permitted to deviate from these requirements, and our implementing rules, with respect to certain operations, installation and maintenance functions. We discuss the permitted deviation under the unfair advantage prong below.

844 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21982-84, para. 158-62 (discussing joint ownership of transmission and switching facilities, buildings and land). We note that, consistent with section 272(b)(5), a lease of office space between an incumbent and its advanced services affiliate must be valued in accordance with the Commission's affiliate transactions rules, reduced to writing and posted on the Internet, and made available to competitors on the same rates, terms and conditions. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21992, para. 181.

845 *See* 47 U.S. C. § 272(b)(4). Consistent with the *Non-Accounting Safeguards Order*, the SBC/Ameritech incumbent, its parent, or any affiliate may not co-sign a contract or any other instrument with the advanced services affiliate that would allow the affiliate to obtain credit in a manner that grants the creditor recourse to the incumbent's assets in the event of a default by the advanced services affiliate. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21995, para. 189.

846 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, para. 178. We note that the conditions permit SBC/Ameritech to transfer employees as part of the creation of the advanced services affiliate.

463. *Asset Transfers*. We find that SBC/Ameritech will not be transferring substantial assets or assets that are necessary to continue the incumbent's traditional business operations.[847] The conditions permit the limited transfer of certain advanced services equipment to the affiliate, but require that such transfers comply with the Commission's affiliate transactions rules and accounting safeguards, including the obligation that the transfer of facilities used to provide advanced services be made at the higher of net book cost or estimated fair market value.[848] This safeguard ensures that the actual value of the asset is reflected in the transfer, and will prevent SBC/Ameritech from discriminating in favor of its affiliate through below-cost transfers. In addition, although not explicitly discussed in the conditions, we recognize that, shortly after the affiliate is created, SBC/Ameritech will also be transferring other types of assets to its separate affiliate including customer accounts, initial capital contribution, and real estate, as well as employees.[849] This limited transfer of assets and employees necessary for the provision of advanced services will not result in the transferring of a substantial portion of the incumbent's assets[850] or the shifting of the incumbent's traditional business operations. The incumbent will continue to provide traditional voice-based circuit-switched local services, as well as other services, through the use of the assets and employees that remain with the incumbent. Moreover, to the extent that our transactional safeguards are applicable to these other asset transfers as well, such safeguards continue to pre-ensure arms-length dealings.[851] We therefore find that a limited one-time transfer of such assets and employees does not frustrate the statutory purpose of section 251, nor manifest substantial continuity between the incumbent and its advanced services affiliate. Rather, such transfers will further the pro-competitive goals of the Act, section 706(a) of the 1996 Act in particular, by facilitating a more efficient and competitive deployment of advanced services to consumers.

464. Although the SBC/Ameritech incumbent is permitted to transfer equipment to its affiliate, the permitted transfers only encompass equipment that is used to provide advanced services. SBC/Ameritech is explicitly not permitted to transfer UNEs or other equipment used primarily to provide basic local services.[852] All equipment transfers between the incumbent and

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[847] Although this conclusion implies that the advanced services affiliate is not a successor or assign of the incumbent, our analysis has no effect on the application of other legal requirements that may apply to such transfers.

[848] *See* 47 C.F.R. § 32.27(b). *See also Accounting Safeguards Order*, 11 FCC Rcd at 17605-07, 17609-10, paras. 144-48, 153-54.

[849] The Commission reserves the right to examine, on a case-by-case basis, the transfer of any additional assets necessary for the creation or functioning of the SBC/Ameritech separate advanced services affiliate.

[850] We expect that the assets that SBC/Ameritech would transfer to the advanced services affiliate, including a reasonable amount of capital necessary to create the advanced services affiliate, would only comprise a small fraction of the incumbent's total assets. We note, however, that where the capital transferred from the incumbent LEC to the advanced services affiliate exceeds reasonable expectations, we would no longer consider such capital to be start-up capital and we would find such transfer to comprise a substantial portion of the incumbent's total assets.

[851] As discussed above, the transfer of such assets must occur at the higher of net book cost or estimated fair market value. In addition, the affiliate must provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transaction. *See Accounting Safeguards Order*, 11 FCC Rcd at 17593, para. 122.

[852] *See* 47 C.F.R. § 53.207 (stating that if a BOC transfers network elements to an affiliate, such entity will be deemed to be an assign of the BOC under section 3(4) with respect to the transferred element).

affiliate also must be conducted within a limited grace period.[853] We note also that the equipment transfers are further limited by the requirement that any new advanced services equipment must be purchased by the affiliate after 30 days from the merger's closing. Allowing this limited transfer of advanced services equipment will facilitate the affiliate's creation and prevent the affiliate from having to duplicate investments that have already been made by the SBC/Ameritech incumbent. Moreover, the limited transfer will allow the affiliate to begin deploying advanced services to consumers more quickly.

465. *Transactional Safeguards*. We find that adequate protection against improper cost allocation exists in the affiliate structure contained in the conditions. Structural separation, by itself, greatly assists in deterring improper cost allocation.[854] Additional protection against improper cost allocation, however, is provided by SBC/Ameritech's adherence to the requirements of sections 272(b)(5) and (c)(2), and the Commission's implementing rules.[855] Complying with the affiliate transactions rules in this case therefore protects ratepayers of regulated services from bearing the risks and costs associated with competitive ventures while allowing for the provision of advanced services in a competitive manner by all providers.[856]

466. Specifically, consistent with section 272(b)(5), the conditions also provide that the SBC/Ameritech incumbent will conduct all transactions with its advanced services affiliate on an arm's length basis, with transactions reduced to writing and timely posted on the

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[853] The conditions permit an SBC/Ameritech incumbent LEC to transfer advanced services equipment, including supporting facilities and personnel, to an advanced services affiliate only until 180 days after the Commission issues a final order, excluding any judicial appeals, in its UNE Remand proceeding, CC Docket No. 96-98.

[854] Structural separation, when properly implemented, ensures that an affiliate's costs are separated from an incumbent, and therefore aids in the prevention and detection of cost misallocation. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, para. 15.

[855] *See Accounting Safeguards Order*, 11 FCC Rcd at 17586-87, paras. 107-09; 47 C.F.R § 32.27. In particular, the affiliate transactions rules discourage cross-subsidization by requiring carriers, in recording asset transfers and services provided between regulated and nonregulated affiliates, to record the costs of such transactions according to certain valuation methodologies. Depending on the circumstances of the transaction, the rules may require an incumbent LEC to reflect the tariffed rate, the rate of publicly-filed agreements, the prevailing price, the net book cost, the fully distributed cost, or the estimated fair market value applicable to individual assets or services. *See* 47 C.F.R. § 32.27(b), (c).

[856] In the *Accounting Safeguards Order*, the Commission concluded that the affiliate transactions rules, with certain modifications to the valuation methodologies, would satisfy the "arm's length" requirement of section 272(b)(5). *See Accounting Safeguards Order*, 11 FCC Rcd at 17588-616, 17652-55, paras. 111-66, 251-58. In the *Joint Cost* proceeding, the Commission adopted the affiliate transactions rules codified in Part 32 as part of a comprehensive effort to improve the safeguards against cross-subsidization. *See generally Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *Order on Reconsideration*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *Order on Further Reconsideration*, 3 FCC Rcd 6701 (1988) (*Joint Cost Further Reconsideration Order*), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). In addition, the Commission relied on the affiliate transactions rules to protect ratepayers from bearing the costs of cross-subsidization in the *Computer III* proceeding. *See BOC Safeguards Order*, 6 FCC Rcd at 7592, para. 48.

company's Internet website in accordance with the Commission's rules.[857] In this way, the relations between an SBC/Ameritech incumbent and its advanced services affiliate will be highly transparent, which will facilitate monitoring and enforcement of the condition's requirements. The only respect in which the SBC/Ameritech incumbent and its affiliate are permitted to deviate from these requirements is with regard to the facilities and services that the affiliate will order out of its interconnection agreement with the incumbent. Although these transactions will not be made available consistent with the transaction disclosure requirements of section 272(b)(45), SBC/Ameritech will comply with all of the Commission's other transaction requirements. Moreover, the interconnection agreement itself will be made publicly available pursuant to the requirements of section 252, and SBC/Ameritech must provide all such services and facilities to unaffiliated parties on a nondiscriminatory basis. Moreover, the transactions will be audited by the independent auditor as part of the thorough advanced services affiliate audit. This audit, which will be conducted on an annual basis by an independent auditor in accordance with industry standards, as well as through any spot audits that may be conducted by Commission staff as part of the Commission's regulatory oversight, should readily detect any improper cost allocation.[858] Given that these safeguards will assist in detecting and deterring cross-subsidization and discrimination, we find that transactions between the incumbent and affiliate are not likely to manifest substantial continuity between the entities.

467. *Unfair Advantage*. For the most part, SBC/Ameritech will comply with the requirements of section 272(c)(1) and will not discriminate between its advanced services affiliate and any other entity in the provision or procurement of goods, services, facilities, or information, or in the establishment of standards.[859] These safeguards are intended to ensure that an affiliate will not derive unfair advantages from the incumbent. The SBC/Ameritech advanced services affiliate must, for example, obtain facilities necessary for the provision of advanced services, such as local loops and collocation space, at the same rates and using the same operations support systems interfaces and procedures that are available to other competitive LECs. This gives the SBC/Ameritech incumbent strong incentive to provide the necessary inputs in an efficient, cost-effective manner that will benefit all providers of advanced services and, ultimately, the public at large. Additionally, the incumbent's provision of inputs to its advanced services affiliate will serve as an important benchmark against which to measure its performance to unaffiliated carriers.

468. We find that an SBC/Ameritech advanced services affiliate will not derive unfair advantages from the activities between it and the incumbent that are permitted under the conditions. First, with respect to joint marketing, we note that section 272(g) expressly

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[857] *See Accounting Safeguards Order*, 11 FCC Rcd at 17594, para. 123. We note that the Commission's rules require incumbent LECs, including SBC and Ameritech, to disclose on a regular basis financial and accounting information needed to assess the allocation of costs. *See* 47 C.F.R. §§ 43.21 (requiring disclosure of financial and accounting data), 64.903 (requiring submission of regular cost allocation manuals). *See also* Automated Reporting Management Information System, FCC Report 43-02 (USOA Report) and FCC Report 43-03 (Joint Cost Report).

[858] We also note that this Commission and state commissions will have access to the independent auditor's working papers, which provides an additional safeguard. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 7.

[859] *See* 47 U.S.C. § 272(c)(1).

contemplates that a BOC and its section 272 affiliate can jointly market and sell the other's services, and, pursuant to section 272(g)(3), this joint marketing would not violate the nondiscrimination provisions of section 272(c). Presumably, the section 272 affiliate would not be a successor or assign of a BOC under section 251(h) and 3(4). We see no reason that the SBC/Ameritech advanced services affiliate should be treated more strictly than a section 272 affiliate. Moreover, permitting the SBC/Ameritech incumbent and its advanced services affiliate to engage in joint marketing activities will further the 1996 Act's objective of spurring rapid deployment of advanced services to consumers by facilitating the SBC/Ameritech affiliate's and incumbent's ability to tailor the services offered in a manner that best suits the consumer's needs.[860] Given the nascency of the advanced services market, joint marketing between an incumbent and its advanced services affiliate would not confer an unfair advantage on the affiliate, particularly as other entities are also able to engage in such marketing activities.

469. Although a closer question is presented by the exclusive provision of customer care services (defined in the conditions as notification of service order progress, response to customer inquiries regarding the status of an order, changes to customer account information, and receipt of certain customer complaints), we find that sharing these services will not unfairly advantage the affiliate. Specifically, we find that prohibiting such sharing of services would add unnecessary costs and burden the affiliate in such a manner that its ability to be an effective advanced services provider would be diminished. Moreover, we believe that it would lead to customer confusion if a customer were not permitted to track the progress of an order or modify account information by placing a single phone call to the incumbent.

470. We conclude that, if we were to prohibit the sharing of joint marketing and customer care services in this context, the ability of an incumbent LEC and its advanced services affiliate to achieve the economies of scale and scope inherent in offering an array of services would be diminished without conferring benefits to justify the prohibition.[861] Moreover, we do not believe that the competitive benefits of allowing an incumbent LEC and its advanced services affiliate to achieve such efficiencies are outweighed by an incumbent LEC's potential to engage in discrimination or improper cost allocation. As described above, an incumbent LEC must allocate the cost of such services between itself and its advanced services affiliate.[862] In addition, an agreement for an SBC/Ameritech incumbent to provide joint marketing and customer care services to its affiliate, or vice versa, constitutes a transaction between the incumbent and affiliate. Accordingly, such transactions must be conducted on an arm's length basis, reduced to writing, and made available for public inspection. Such transactions, of course, also will be inspected by the independent auditor, as noted above.

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860 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22048, paras. 296.

861 *See Id.* at 21991, para. 179 (concluding the same regarding the sharing of joint marketing services between a BOC and its section 272 affiliate).

862 In this way, the incumbent LEC's ratepayers will not bear the costs associated with the marketing activities related to advanced services. *See* 47 C.F.R. § 64.901-904. *See also Accounting Safeguards Order*, 11 FCC Rcd at 17561, para. 50.

471. Allowing the SBC/Ameritech advanced services affiliate to use the incumbent's brand name in this situation is also consistent with and furthers the 1996 Act's objective to promote competition and innovation in the local market. As with joint marketing, we note that section 272 does not prohibit the use of the BOC's brand name by its affiliate. In this context, by permitting the advanced services affiliate to use a widely-recognized brand name, SBC/Ameritech will be in a position to bring new packages of services, lower prices, and increased innovation to customers in a more expedient manner. Moreover, given the nascency of the advanced services market, we do not believe it is unfair to permit the affiliate to use the incumbent's brand name as other competitors may have an equally well-recognized brand name, or an equivalent opportunity to develop one. Accordingly, we find no basis for restricting the affiliate's use of the incumbent's brand name in this case.

472. We decline to limit the advanced services affiliate's ability to purchase UNEs from, or resell the retail services of, an SBC/Ameritech incumbent LEC.[863] The advanced services affiliate will not be not precluded from providing local exchange services, such as local, circuit-switched services,[864] as long as it provides such services bundled in conjunction with advanced services. The affiliate will also be allowed to provide incumbent LEC resold services in the same manner as any other competitive LEC. As long as the affiliate obtains services and facilities from the incumbent LEC pursuant to a tariff or valid interconnection agreement, the affiliate will stand in the same position as any competitive advanced services provider and should therefore have the same flexibility as competitors to provide "one-stop shopping" to its customers. We find that the increased flexibility resulting from the affiliate's ability to provide both advanced services along with traditional local exchange services serves the public interest, because such flexibility will encourage the advanced services affiliate to provide innovative new services.[865] Moreover, we note that the conditions contain safeguards which should deter the affiliate from pricing its retail services below the wholesale price it pays to the incumbent.[866]

473. Although the conditions permit SBC/Ameritech and its affiliate to share operation, installation, and maintenance (OI&M) services, we do not find that such sharing will confer upon the affiliate an unfair advantage in the provision of advanced services. We reach this conclusion for several reasons. First, although sharing of these services is permitted, the conditions also provide that such services will be made available to unaffiliated entities on a

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863 *See* CompTel July 19 Comments at 2-4.

864 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055-56, paras. 312-13 (stating that a section 272 affiliate cannot be precluded under section 251 from qualifying as a requesting carrier that is entitled to purchase unbundled elements or retail services at wholesale rates from the BOC and declining to distinguish between a section 272 affiliate's ability to provide local service by reselling BOC local exchange service and its ability to offer such service by purchasing unbundled elements from the BOC). We also note that the rules promulgated in the *Non-Accounting Safeguards Order* include a statement that: "[a] BOC affiliate shall not be deemed a 'successor or assign' of a BOC solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act." 47 C.F.R. § 53.205.

865 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22057-58, para. 315 (addressing a section 272 affiliate's ability to provide local and long distance services).

866 For example, SBC/Ameritech and the affiliate may not jointly own switching and transmission facilities and must comply with our accounting safeguards rules.

nondiscriminatory basis. As such, there should be no difference in price or quality between the OI&M services provided to the affiliate vis-a-vis unaffiliated entities. Second, although we recognize that in the section 272 context the Commission prohibited the sharing of these functions, we do not find such a prohibition to be required in the advanced services context. For example, because the loop is used to provide both telephone exchange services and advanced services, greater network integration is required in the provision of advanced services than in the provision of long distance services. Given this, allowing the SBC/Ameritech incumbent to share these services with its affiliate, on the same basis that it shares them with unaffiliated entities, will permit greater economies of scope and enable the affiliate to be a more efficient competitor. Third, as described above, the merger conditions require a rigorous internal compliance program and annual audits. We believe that these mechanisms will adequately deter SBC/Ameritech from favoring its affiliate in the provision of OI&M services (as well as other services).

474. For similar reasons, we do not find that permitting the SBC/Ameritech incumbent to provide billing and collection services to its advanced services affiliate and other unaffiliated entities on a nondiscriminatory basis would unfairly advantage the affiliate. We note that the billing and collection services provided by the incumbent to the affiliate will be made available to other advanced services providers on a disaggregated basis that allows these unaffiliated carriers to select the particular services that they desire from the incumbent. Allowing this nondiscriminatory provision of billing and collection services by the incumbent not only enables the affiliate to receive greater economies of scope, but it may also enable unaffiliated providers to be more efficient competitors, thereby accelerating the deployment of advanced services by all carriers. Again, we find that the conditions' internal compliance program and annual audit requirements should deter and detect any preferential treatment.

475. We also find that the SBC/Ameritech advanced services affiliate will not derive unfair advantage from the incumbent through the activities that are permitted for a short, transitional period. We recognize that because SBC/Ameritech had previously been performing such activities on an integrated basis, it will take some time, both logistically and technically, to remove these functions from the incumbent. We are therefore persuaded that the incumbent's provision of these activities on an interim basis to the affiliate is a reasonable measure to effectuate the creation of the advanced services affiliate and its orderly transition. Moreover, we note that the separate affiliate requirement will not sunset until 36 months after the incumbent ceases to process trouble reports on behalf of the affiliate on an exclusive basis. As such, the conditions provide an incentive for the transitional period to be a very limited one.

476. Although the discriminatory provision of line sharing ordinarily would give us concern that the affiliate is deriving unfair advantage from the incumbent, our concern is tempered in this case for two reasons. First, exclusive line sharing is only an interim measure that will disappear when the SBC/Ameritech incumbent provides line sharing to unaffiliated entities. Second, during the period in which an SBC/Ameritech incumbent provides interim line sharing to an affiliate, competing providers will receive the economic equivalent of this "interim line sharing" through a 50 percent discount on the use of a second loop to provide advanced

services. We are therefore persuaded that the incumbent's provision of line sharing exclusively to the affiliate does not confer an unfair advantage upon the affiliate in this case.

2. Requests Regarding Other Conditions

477. *Surrogate Line-Sharing Discount.* We reject the suggestion of several carriers that we require the merged firm to make line sharing available immediately to competitors.[867] The Commission recently issued a further notice of proposed rulemaking that sought comment on operational, pricing and other practical issues associated with line sharing.[868] We find it more suitable to address these complex issues in the context of the ongoing industry-wide rulemaking rather than this merger proceeding.

478. We also decline to require that SBC/Ameritech delay offering line sharing to its separate advanced services affiliate through its "interim line-sharing" proposal until it offers line sharing on a commercial scale to competitors.[869] We do not find that permitting interim line sharing between an SBC/Ameritech incumbent and its affiliate will unfairly advantage the affiliate vis-à-vis competitors because through the surrogate line sharing discount, unaffiliated carriers will be on comparable economic footing with the SBC/Ameritech advanced services affiliate.

479. *Access to Advanced Services Loop Information.* Some competing carriers object that SBC/Ameritech is allowed 22 months after the merger closing date to provide electronic access to advanced services loop information (*i.e.,* the theoretical loop length) in the Ameritech states.[870] As noted above, unlike SBC, Ameritech purportedly does not already have the necessary information in electronic form. Because, in the Ameritech region, the SBC/Ameritech separate advanced services affiliate will be disadvantaged in the same manner as competing advanced services providers without electronic access to loop pre-qualification information, we believe that SBC/Ameritech will have every incentive to expedite its fulfillment of this condition.

480. *Nondiscriminatory Rollout of xDSL Services.* Some parties suggest that this condition should affirmatively require SBC/Ameritech to adhere to a timetable for deploying xDSL technology to rural and low-income areas.[871] Other commenters question when the Applicants' obligation under this condition would become effective, and suggest that the Commission require at least one low-income rural and urban wire center among the first ten wire centers where the merged firm rolls out xDSL service.[872] Given the high market demand for

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867 *See, e.g.*, Covad July 22 Comments at 41-43.

868 *See Advanced Services Further Notice*, 14 FCC Rcd at 4805-12, paras. 92-107.

869 *See* CompTel July 19 Comments at 4; CoreComm July 22 Comments at 16.

870 *See* CoreComm July 22 Comments at 12.

871 *See, e.g.*, APPA July 19 Comments at 5.

872 AARP and the Consumer Coalition, for example, link the nondiscriminatory deployment of xDSL services to the requirements of the National-Local Strategy, and suggest that at least one low-income rural and one low-income urban wire center should be included in the initial ten wire centers. *See* AARP July 19 Comments at 5;

advanced services, and that a number of other conditions are designed to spur deployment of advanced services and to benefit low-income consumers, we decline to subject SBC/Ameritech to a specific timetable for advanced services deployment, or to enforce the condition prior to deployment in twenty wire centers. We note, however, that SBC/Ameritech will report the status of its xDSL deployment, including deployment to low-income areas, to the Commission on a quarterly basis.

481. *Carrier-to-Carrier Performance Plan.* We reject the suggestion of a number of commenters that we impose the complete list of measurements adopted by the Texas PUC or other state commissions, such as California.[873] We also decline to adopt other specific performance measurements advocated by certain parties,[874] or to make specific changes in the proposal, such as altering the benchmarks or statistical methodology.[875] We reiterate that the Carrier-to-Carrier Performance Plan constitutes the Applicants' voluntary proposal for monitoring and remedying the specific potential public interest harms identified in the instant merger, including the potential for increased discrimination by the larger merged entity and the loss of another major incumbent LEC benchmark. In contrast, performance programs that are being developed by state commissions in the context of section 271 proceedings serve a different purpose and may be designed to cover more facets of local competition and to prevent a BOC from backsliding on section 271 obligations. The Carrier-to-Carrier Performance Plan that we adopt today serves a more limited purpose, and hence has a more limited scope. Moreover, we note that, to account for necessary revisions or updates, the plan includes a semi-annual review of the plan's measurements by the Chief of the Common Carrier Bureau and SBC/Ameritech. Significantly, the Carrier-to-Carrier Performance Plan is only one component of a broad package of voluntary merger safeguards proposed by the Applicants. Measures that are sufficient as part of a comprehensive package of safeguards in the present merger context may not be adequate in the section 271 context.

482. Similarly, we decline to require parity across measurements between different states, as suggested by the Indiana Utility Regulatory Commission.[876] We find that the plan is sufficient, for merger purposes, to reduce the larger entity's increased incentive for discrimination by giving its individual operating companies incentives to treat competitors as

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Consumer Coalition July 19 Comments at 4, Aff. at 30. The xDSL service rollout commitment, however, applies only to SBC/Ameritech in-region states. Because the National-Local Strategy is aimed at fostering competition in both POTS and advanced services, we decline to expand the nondiscriminatory xDSL rollout obligation to out-of-region markets.

873 *See, e.g.,* ALTS July 19 Comments at 8-10; CoreComm July 22 Comments at 8; Covad July 22 Comments at 12-14; Focal/Adelphia/McLeod July 19 Comments at 22-23; GST/KMC/Logix/RCN July 19 Comments at 2; ICG July 20 Comments at 7-10; Level 3 July 19 Comments at 6-7; Sprint July 19 Comments at 56-58; Time Warner Telecom July 19 Comments at 3-4. *See also* California PUC July 28 Reply Comments at 5-6 (questioning whether this condition will derail or delay state efforts to establish performance measures).

874 *See, e.g.,* MCI WorldCom July 19 Comments at Att. 1 (containing an alternate performance measurement plan).

875 *See, e.g.,* MCI WorldCom July 19 Comments at 17-19.

876 *See* IURC July 19 Comments at 5 (claiming the Applicants' initial proposal was problematic because it was not designed to achieve performance parity between different states).

they would SBC's or Ameritech's own retail operations. Other merger commitments, such as the most-favored nation and OSS conditions, address uniformity and the spread of best practices across the merged firm's 13-state region.

483. Although some commenters also note that SBC/Ameritech's obligation to make voluntary incentive payments under the plan commences later in Connecticut than in the other SBC/Ameritech states,[877] SBC has indicated that in light of its recent acquisition of SNET, it needs additional time to implement the payment obligations in that state. Given this, and that the voluntary payment obligations for Connecticut will extend for the full 36 month period, we find it reasonable for SBC to allow additional time to conform its systems in Connecticut.

484. *Uniform Enhanced Operations Support Systems.* Although several parties contend that the OSS enhancement implementation timelines are too long and should be shortened,[878] we are persuaded by the Applicants' assertion that timelines contained in their commitments "reflect the bare minimum time needed for successful implementation of the required elements."[879] Given that unification of the OSS systems of SWBT, PacTel, SNET and Ameritech is a substantial undertaking, and recognizing that the benefit of the OSS enhancements will be realized for at least a full 36-month period, we deem the implementation timelines reasonable. We expect SBC/Ameritech to design and build reliable, error-free systems that will serve the needs of competitors and their customers as efficiently as possible.[880] Moreover, we note that SBC/Ameritech has an incentive to expedite deployment of these enhancements. For example, until SBC/Ameritech develops and deploys the advanced services OSS enhancements and interfaces, and until those systems are actually used by its separate advanced services for the bulk of its pre-ordering and ordering, competitors will receive a 25-percent discount on the recurring and nonrecurring charges for loops used in the provision of advanced services. In addition, the maximum amount of SBC/Ameritech's voluntary incentive payments in the third year of the Carrier-to-Carrier Performance Plan decreases proportionately as the firm implements the OSS enhancements, interfaces, and business requirements ahead of schedule.

485. Competitors also assert that the July proposal's remedy of $100,000 per business day, capped at $10 million, for failure to meet the OSS implementation schedules is not an adequate incentive for a company the size of a combined SBC and Ameritech. With subsequent filings, the OSS voluntary incentive payments are now $110,000 per business day, capped at $20 million, which we find adequate to incent the company to satisfy its obligations in a timely manner. In addition, unlike the initial proposal, with the August Clarification, the payments will

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877 *See* Covad July 22 Comments at 12-13; CTC July 19 Comments at 7-8.

878 *See* ALTS July 19 Comments at 12-13 (suggesting 3-4 month deadline for Phase II, 9-12 month deadline for Phase III); AT&T July 19 Comments, App. A at 35, 39; CoreComm July 19 Comments at 5-7; GST/KMC/Logix/RCN July 19 Comments at 4; ICG July 20 Comments at 5; MCI WorldCom July 19 Comments at 28-29; Northpoint July 19 Comments at 24-25; Sprint July 19 Comments at 43-45. Allegiance asserts that the OSS timelines are selective and should be more comprehensive. *See* Allegiance July 19 Comments at 3.

879 SBC/Ameritech July 26 Reply Comments at 50.

880 *See id.* at 83.

reach back to the initial failure date, should a failure occur, which removes incentive on SBC/Ameritech's part to delay arbitration.

486. Competitive carriers also seek to have the Commission require third-party testing of the OSS enhancements and interfaces to ensure that they are uniform, comply with applicable standards and guidelines, and are scalable and workable, meaning that they support seamless end-to-end interoperability for all five core OSS functions.[881] Although comprehensive third-party testing may be useful in other contexts, such as section 271 proceedings, we decline to require SBC/Ameritech to submit its OSS enhancements and interfaces to third-party testing as part of these conditions.[882] We find adequate enforcement mechanisms at our disposal should SBC/Ameritech not develop and deploy OSS enhancements and interfaces consistent with the requirements of the conditions. Moreover, SBC/Ameritech has committed to make significant voluntary incentive payments if it fails to deploy OSS upgrades and enhancements in substantial compliance with the collaborative agreement. This potential exposure should provide adequate incentive for the merged firm to develop and deploy efficiently OSS enhancements and interfaces that fully comply with the collaborative agreement and are scalable and workable.

487. We also reject the other more specific changes to the OSS conditions suggested by commenters. Several parties claim, for example, that the conditions should define SBC/Ameritech's precise obligations under each phase and for each obligation.[883] We find that these are details that will be addressed in the collaborative process. Ideally, the details of implementing the uniform OSS enhancements and interfaces will be worked out expeditiously in these workshop sessions. We find no reason to prevent the voluntary participants, with the assistance of a neutral arbitrator, if necessary, and oversight of the Common Carrier Bureau, from determining the best manner in which to implement the requirements of these conditions.[884]

488. *Training in the Use of OSS for Qualifying Carriers.* CompTel suggests that the Commission should lower the threshold for a carrier to qualify for assistance under this

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881 *See, e.g.,* ALTS July 19 Comments at 13-14; AT&T July 19 Comments at 41; MCI WorldCom July 19 Comments at 32-33; NextLink/ATG July 19 Comments at 26. The Consumer Coalition also suggests that, as part of the merger conditions, we require SBC and Ameritech to conduct an independent, commercial scale test of OSS prior to section 271 authorization. Consumer Coalition July 19 Comments at 2, Aff at 16. While we encourage the use of independent third-party testing as a means of ascertaining whether a BOC is meeting section 271's requirements, we decline to require such testing as part of this merger proceeding.

882 We note that the Illinois Commerce Commission's merger conditions require the combined firm to pay for an independent third-party to provide technical assistance to the ICC and to conduct a test of the merged firm's OSS enhancements. *See ICC Merger Order*, at 199.

883 *See, e.g.,* CompTel July 19 Comments at 33-34; CoreComm July 19 Comments at 6-7; Level 3 July 19 Comments at 6-7; MCI WorldCom July 19 Comments at 33-34 (specifying minimum requirements for change management process); Sprint July 19 Comments at 43; Time Warner July 19 Comments at 6.

884 The conditions we adopt today set the standard for the Applicants' obligations under the condition. Although the details of implementation may be worked out in a collaborative session, or under the auspices of an independent arbitrator, the Commission at all times maintains final enforcement authority over SBC/Ameritech's implementation of the OSS enhancements, interfaces and business requirements. *See* Sprint July 19 Comments at 52-54.

condition,[885] while other carriers ask that this Commission, rather than state commissions, verify a competitive LEC's status as a qualifying carrier.[886] We decline to take either suggestion. We find that limiting eligibility to those competitive LECs that earn less than $300 million in annual revenues should adequately target those carriers in most need of assistance, and thereby stimulate competitive entry.[887] Further, we find that, given state commissions' roles in certifying competitive LECs and monitoring their activity within the state, they are best-suited for verifying the status of a particular competitive LEC.

489. *Collocation Compliance*. We decline to alter the nature and design of the collocation audits. Commenters suggest that the Commission should exert more control to ensure neutrality and completeness,[888] and that the audit period should be extended.[889] As indicated above, we find that the independent audit procedures set forth in the conditions, with participation by the Common Carrier Bureau, will ensure that SBC/Ameritech is in compliance with all collocation requirements.

490. *Most-Favored Nation Arrangements*. We also reject requests by commenters to change SBC/Ameritech's most-favored nation obligations. Parties claim, for example, that the limitation in the out-of-region provision that SBC/Ameritech must only provide an interconnection arrangement or network element that had not previously been available by that incumbent is unnecessarily restrictive.[890] Instead, they urge us to require SBC/Ameritech to offer, if requested, each interconnection arrangement or UNE that SBC/Ameritech avails itself of outside of its service territory, or every arrangement or UNE that is being offered by the host incumbent. The change requested by these carriers, therefore, could require SBC/Ameritech to provide in-region every interconnection arrangement or UNE that is being offered by each incumbent in all 30 out-of-territory markets. We are concerned that such a requirement would be inefficient and undermine the National-Local Strategy's goals. If such a requirement were imposed, SBC/Ameritech might select cities to enter by limiting the number of incumbent LECs whose territory it enters, or by only entering areas where the incumbent offers less diverse arrangements. Either strategy would undermine our expectation that the merged firm will enter diverse geographic markets and become a powerful competitive LEC as part of its National-Local Strategy. The condition as written balances these policy considerations by ensuring that SBC/Ameritech will not seek special arrangements outside its territory that it would not offer to competitors inside its territory.

491. Several competitive LECs also urge us to require SBC/Ameritech to make available in all 13 SBC/Ameritech states any interconnection arrangement or network element

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885 CompTel July 19 Comments at 34.

886 NorthPoint July 19 Comments at 21; Covad July 22 Comments at 36.

887 *See* SBC/Ameritech July 26 Reply Comments at 56 (intending OSS assistance "to help those CLECs that genuinely need it.").

888 *See, e.g.,* Allegiance July 19 Comments at 3-4; ALTS July 19 Comments at 11.

889 *See* ALTS July 19 Comments at 11 (suggesting an 18-month audit period).

890 *See, e.g.,* Allegiance July 19 Comments at 8; ALTS July 19 Comments at 24; CompTel July 19 Comments at 36-38; Consumer Coalition July 19 Comments at 2, Aff. at 13; Sprint July 19 Comments at 38-39.

that is available in any SBC or Ameritech state, whether voluntarily negotiated or arbitrated.[891] We decline to expand the condition to arbitrated arrangements because doing so might interfere with the state arbitration process under sections 251 and 252 of the Communications Act. We note that where SBC/Ameritech has stipulated in arbitration proceedings that specific arrangements have been determined through negotiation, these voluntary arrangements will be available for "most-favored nation" treatment. If we required SBC/Ameritech to import arbitrated terms and conditions from one state into all others, then one state could effectively interpret the merged firm's obligations under sections 251 and 252 for all other states.[892] For similar reasons, we decline to extend the condition to reach the Proposed Interconnection Agreement (PIA) in Texas.[893]

492. We also decline the request by some commenters that the condition apply to interconnection agreements negotiated by Ameritech, Pacific Bell or SNET prior to each entity's acquisition by SBC.[894] We find it reasonable for this condition to be implemented on a going-forward basis, applying only to arrangements negotiated by an affiliate of SBC. In this way, SBC/Ameritech, bearing in mind its commitment to implement best practices, will be on notice as to which systems and procedures could become uniform across its region. Furthermore, we find that the technical feasibility exemption is not a loophole,[895] for the relevant state commission can ascertain what is possible in light of state law and the technical capability of SBC/Ameritech's systems within that state.

493. *Carrier-to-Carrier Promotions*. We also reject commenters' suggestions that we eliminate the restrictions on the availability of the carrier-to-carrier promotions. For example, commenters seek removal of the limitation that competitors receiving the promotional unbundled loop discount can only use these loops for voice services, as well as the residential restriction and line limitation contained in each of the three promotions.[896]

494. We find that, by targeting the promotions to the residential market, these conditions will bring more competitive offerings to residential customers that have less choice today than large or medium-sized business customers. Our desire to promote residential competition is consistent with Congress's intent, through enacting the 1996 Act, to spur

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891 *See, e.g.*, Allegiance July 19 Comments at 8; ALTS July 19 Comments at 25; Cablevision Lightpath July 26 Reply Comments at 5; Consumer Coalition July 19 Comments at 2, Aff. at 14-15; CoreComm July 22 Comments at 22; Covad July 22 Comments at 64; Metromedia Fiber July 19 Comments at 7-9; Sprint July 19 Comments at 39-40; Time Warner July 19 Comments at 16.

892 *See* SBC/Ameritech July 26 Reply Comments at 65.

893 *See* Texas PUC Aug. 5 Comments at 2-3 (suggesting that "the MFN provisions should extend to language that has been approved as part of state regulatory decisions concerning RBOC entry into long distance services under 47 U.S.C. § 271, since the RBOC would be voluntarily agreeing to such language as a condition of § 271 approval.").

894 *See* CoreComm July 22 Comments at 22; ICG July 20 Comments at 5.

895 *See, e.g.*, MCI WorldCom July 19 Comments at 55.

896 *See* ALTS July 19 Comments at 23-24; Cable & Wireless July 19 Comments at 6-7; CompTel July 19 Comments at 4; MCI WorldCom July 19 Comments at 51-54.

facilities-based competition to serve residential customers.[897] Moreover, we find that the promotions' limited duration and line limitations will motivate competing carriers to enter the residential market faster to secure the benefit of the promotions, thereby accelerating the availability of competitive offerings to residential consumers.[898] Once a carrier secures the promotion, however, it is guaranteed the promotional terms for a full three-year period. Because our intent is for these promotions to ignite competition in the residential local exchange or exchange access markets in SBC's and Ameritech's regions, we decline to expand this particular condition to cover loops used in the provision of advanced services. Indeed, we note that competitors that choose to use an unbundled loop to provide advanced services receive greater discounts elsewhere in the conditions.[899]

495. We also reject arguments by certain competitive LECs that the carrier-to-carrier promotions are unlawful in that they contradict core premises of the Communications Act and Commission rules.[900] First, based on the manner in which SBC/Ameritech will execute its obligations, we do not find that the residential and voice service restrictions transgress the Act or corresponding Commission rules.[901] Specifically, SBC/Ameritech will implement the promotions by voluntarily offering to amend its interconnection agreements with telecommunications carriers to incorporate the promotional terms.[902] Moreover, SBC/Ameritech will make this offer in a nondiscriminatory manner to all telecommunications carriers with which it has an interconnection agreement in any SBC/Ameritech state.

496. The 1996 Act and corresponding Commission rules give incumbent LECs and their competitors certain latitude to enter into customized contractual arrangements, subject to section 252(i)'s requirement that any negotiated arrangement must be made available to all interested carriers. Section 252(a)(1) provides that "an incumbent local exchange carrier may

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897 *See* S. Conf. Rep. No. 104-230, at 148 (contemplating that 1996 Act would promote facilities-based, "local residential competition").

898 We decline to increase the resale discount. *See, e.g.* MCI WorldCom July 19 Comments at 53-54. We find that the thirty-two percent discount, which we note is seven percent higher than the maximum default wholesale discount rate the Commission adopted in the *Local Competition Order*, should facilitate competitive entry in the residential market. *See Local Competition Order*, 11 FCC Rcd at 15955-56, 15963-64, paras. 910, 932-33.

899 The conditions already establish a discount of over 50 percent for loops used to provide advanced services. *See* Appendix C at Section II (surrogate line sharing discount); Section III (advanced services OSS discount).

900 *See, e.g.*, AT&T July 19 Comments at 16, App. A at 83-87; CompTel July 19 Comments at 14-18; Focal/Adelphia/McLeod July 26 Reply Comments at 9.

901 *See* 47 U.S.C. § 251(c)(3), (4)(b) (nondiscrimination requirements); 47 C.F.R. § 51.313(a) (requiring nondiscriminatory access to network elements); 47 C.F.R. § 51.603(a) (requiring nondiscriminatory resale); 47 C.F.R. § 51.503(c) (providing that an incumbent's rates shall not vary on the "basis of the class of customers served by the requesting carrier, or the type of services that the requesting carrier purchasing such elements uses them to provide.").

902 *See* 47 U.S.C. § 252(a)(1). With SBC/Ameritech voluntarily offering to amend interconnection agreements, states will not be in the position of putting the discount into arbitrated agreements. *See* California PUC July 28 Reply Comments at 3-5 (questioning whether the CPUC can put the discount into an interconnection agreement and remain legally consistent with section 252(d)(3) of the Communications Act). Of course, the amended agreements will still be subject to state commission approval of voluntarily negotiated agreements pursuant to 47 U.S.C. § 252(e).

negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in sections (b) and (c) of section 251."[903] Likewise, although section 252(e)(2) requires a finding of compliance with section 251 when state commissions review arbitrated agreements, there is no corresponding requirement with respect to negotiated agreements.[904]

497. Some commenters[905] contend that the line limitation on the number of discounted loops, resale and platform offerings that will be made available to competitive LECs would violate the "pick and choose" rule of section 252(i), as well as the general nondiscrimination requirements of section 251(c)(3) and 251(c)(4)(B).[906] We note that, under the specific terms of the merger conditions, these promotions are being offered to competitors in a nondiscriminatory fashion. Specifically, in each of its states, SBC/Ameritech will offer the promotion simultaneously to all telecommunications carriers that have an existing interconnection and/or resale agreement with SBC or Ameritech, and, for carriers that accept the promotion at any time within 10 business days of the initial offer, SBC/Ameritech will simultaneously file the amendments with the relevant state commission for approval. These measures should ensure that all competitive LECs operating in SBC/Ameritech's region will be afforded an equal opportunity to participate in the promotions. Moreover, carriers that begin operating in SBC/Ameritech's region, or decide to participate in the promotions, after this initial offer period will have the opportunity to participate in the offerings, and SBC/Ameritech will respond to their inquiries within 10 days. To this end, SBC/Ameritech will notify all carriers operating in the state when 50 percent and 80 percent of the maximum lines in that state are reached.

498. *Offering of UNEs.* Several commenters criticize SBC and Ameritech for not committing to provide indefinitely the UNEs described in section 51.319 of the Commission's rules, regardless of the outcome of the UNE Remand proceeding.[907] Certain cellular carriers also ask that the condition explicitly recognize extended local calling area arrangements, commonly

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[903] 47 U.S.C. § 252(a)(1). *See Local Competition Order*, 11 FCC Rcd at 15528, paras. 54, 58 (stating that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt.").

[904] 47 U.S.C. § 252(e)(2). The Supreme Court recognized this distinction in *AT&T Corp. v. Iowa Utilities Board*, stating: "When an entrant seeks access through [resale, leasing of unbundled network elements, or interconnection], the incumbent can negotiate an agreement without regard to the duties it would otherwise have under §251(b) or (c). But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to §251 and the FCC regulations promulgated thereunder." *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. at 727 (footnote and citation omitted).

[905] *See, e.g.*, AT&T July 19 Comments at 15, App. A at 83-87; CompTel July 19 Comments at 14-18; Focal/Adelphia/McLeod July 26 Reply Comments at 9.

[906] *See* 47 C.F.R. § 51.809(a) (implementing pick and choose rule of section 252(i). *See also* 47 C.F.R. § 51.313(a) (requiring nondiscriminatory access to network elements); 47 C.F.R. § 51.603(a) (requiring nondiscriminatory resale). As explained above, the nondiscrimination requirements of section 251(c) and corresponding Commission rules do not apply to voluntarily negotiated agreements.

[907] *See, e.g.*, AT&T July 19 Comments, App. A at 75-78; CoreComm July 22 Comments at 17. GST/KMC/Logix/RCN July 19 Comments at 9-10; Level 3 July 19 Comments at 14; MCI WorldCom July 19 Comments at 48-49; Sprint July 19 Comments at 31-33.

known as reverse billing arrangements, in order to prevent the merged firm from terminating Ameritech's existing extended local calling area arrangements.[908] We emphasize that this condition has practical effect only in the event that the Commission's rules in the UNE Remand proceeding are stayed or vacated. Until that time, SBC/Ameritech will comply with the unbundling rules mandated by the Commission in the UNE Remand proceeding.

499. *Alternative Dispute Resolution Through Mediation.* We reject Covad's request that we expand the ADR process to permit multi-state mediations of similar or common issues.[909] As noted above, a core component of the optional alternative dispute resolution process set forth in the conditions is the voluntary participation of state commission staff, which, we anticipate, will assist carriers in getting disputes resolved quickly. Multiple states, therefore, may choose to be involved but we do not require such participation in this Order.

500. *Access to Cabling in Multi-Unit Properties.* Parties generally support the conditions related to accessing cabling in multi-unit premises, but request that the Commission make the trial more comprehensive. ALTS, for example, comments that the proposed trial excludes buildings that contain only medium-sized and large commercial tenants.[910] We find that the cabling trials are sufficient to address their intended purpose, which is verifying the technical feasibility and costs of such offerings, and therefore decline to alter the features of the trials. Moreover, we believe that the Applicants' commitment to provide carriers with access to LEC owned or controlled cabling behind a single point of interconnection for multi-unit properties and campuses of garden apartment dwellings will significantly further competitors' access to cabling. We also note that, in addition to these conditions, SBC/Ameritech will comply with any rules resulting from the UNE Remand proceeding.

501. *Out-of-Territory Competitive Entry (National-Local Strategy).* Some commenters claim that the condition establishing milestones for the Applicants' National-Local Strategy does not go far enough in advancing residential competition, and therefore urge us to strengthen SBC/Ameritech's residential entry requirements.[911] The Consumer Coalition, for example, suggests that, rather than simply buying up competitive LECs, the merged firm should have to meet at least half of its build-out commitments with new facilities.[912] Imposing these additional restrictions would severely limit the Applicants' ability to undertake innovative business strategies or ventures with other firms. We anticipate that the presence of SBC/Ameritech, a large, experienced incumbent LEC, as a facilities-based competitor in 30 markets will foster competition in those market. We find that the entry requirements included within the

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908 *See* Joint Cellular Carriers July 19 Comments at 2 (requesting that condition apply to extended local calling area arrangements currently provided by Ameritech in Michigan).

909 *See* Covad July 22 Comments at 61-63.

910 ALTS July 19 Comments at 26-28.

911 *See* Consumer Coalition July 19 Comments at 3, Aff. at 20-28 (advocating that SBC/Ameritech be required to achieve a certain level of residential penetration or demonstrate a good faith effort to attract residential customers); Time Warner July 19 Comments at 17-19.

912 Consumer Coalition July 19 Comments at 3, Aff. at 24-25.

Applicants' proposed condition are sufficient to ensure that SBC/Ameritech provides meaningful, facilities-based service outside its territories.

502. *Enhanced Lifeline Plans.* We reject the requests of some commenters that we impose additional requirements on SBC/Ameritech's offer of enhanced Lifeline plans.[913] We also decline to obligate the merged firm to provide community voice mail services or community technology centers for residential customers in low-income areas.[914] Although these additional requirements would benefit low-income consumers, SBC and Ameritech point out that such matters are being addressed at the state level.[915] We find that the Applicants' commitment to offer states an enhanced Lifeline plan, which was significantly strengthened after the comment period, will provide substantial direct benefits to low-income residential consumers.

503. *Independent Auditor.* We disagree with arguments by commenters that we should not rely on independent audits because the auditor may not retain an appropriate degree of independence.[916] The Commission is not delegating its enforcement and investigative authority, or its responsibility to enforce the Act, to either the independent auditor or the Applicants.[917] Instead, we are adopting the Applicants' plan that involves using an independent audit as a cost-effective tool to supplement the Commission's normal processes and procedures. The Commission has the authority to use independent auditors to supplement our usual investigative the authority,[918] and we have extensive experience with this method for ensuring compliance with our rules.[919] Independent audits, combined with targeted on-site audits conducted by Commission staff and thorough reviews of the auditor's working papers, have proven largely successful in ensuring compliance with the Commission's accounting

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913 *See, e.g.*, AARP July 19 Comments at 4-5; Edgemont July 19 Comments at 6-8; ParkView Areawide Seniors July 19 Comments at 7-10.

914 *See* Low Income Coalition July 19 Comments at 9-14; Edgemont July 19 Comments at 9-11, 13.

915 *See* SBC/Ameritech July 26 Reply Comments at 91 (explaining that SBC and Ameritech have worked with state officials and community groups in Ohio and California to establish and ensure ongoing support for community technology centers). *See also ICC Merger Order*, at 232-36 (adopting SBC/Ameritech's commitment to establish a community technology fund in Illinois).

916 *See* Sprint July 19 Comments at 61; Level 3 July 19 Comments at 4-6; GST/KMC/Logix/RCN July 19 Comments at 4; MCI WorldCom July 19 Comments at 59-60.

917 *See* Sprint July 19 Comments at 61-62.

918 *See* 47 U.S.C. § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits").

919 *See Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities*, CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298, paras. 243-73 (1987) ("*Joint Cost Order*"), *modified on recon.*, 2 FCC Rcd 6283 (1987) ("*Joint Cost Reconsideration Order*"), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.*, *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). *See also* 47 U.S.C. § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits); *see also* 47 C.F.R. §§ 64.904 (requiring independent audits of cost allocation procedures), 69.621 (establishing an independent audit requirement regarding certain universal service rules). Besides the audits noted above, the Commission has additional experience with independent evaluations of structural, transactional, and nondiscrimination requirements pursuant to the provisions of section 274. *See* 47 U.S.C. § 274(b)(8); *Accounting Safeguards Order*, 11 FCC Rcd at 17640-43, paras. 220-26.

safeguards.[920] Furthermore, the independent audit requirement in the 1996 Act indicates that independent audits are useful tools for evaluating compliance with structural, transactional, and nondiscrimination requirements.[921] Likewise, we view the success that other federal agencies have had with independent audit programs as further evidence that the audit provisions will be an effective tool for ensuring compliance with the conditions.[922]

504. By relying on auditing industry standards, the condition ensures that SBC/Ameritech will engage a technically proficient licensed auditor, and that the auditor will exercise due care in performing the audit and obtain sufficient evidence needed to support its findings.[923] Because the auditor will evaluate the sufficiency of SBC/Ameritech's internal control structure, the conditions provide for an assessment of the merged firm's ability to comply on an ongoing basis, and thereby establish a heightened compliance standard. Furthermore, Commission oversight of the audit process and the public disclosure of the auditor's report further convince us that the independent auditor will perform the engagement to our satisfaction.[924] We anticipate that Commission review of the auditor's working papers, and the public disclosure of the auditor's detailed final report, will provide additional assurances regarding the thoroughness of the audit and the auditor's independence.[925] The Commission can take appropriate action, including terminating the independent auditor, in the event problems arise related to the conduct of the audit.

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920 *See Computer III Remand Order* at para. 52; *see also* Pacific Bell, *Order to Show Cause*, 10 FCC Rcd 5503 (1995), *Consent Decree Order*, 11 FCC Rcd 14813 (1996); US West Communications, Inc., Order to Show Cause, 10 FCC Rcd 5523 (1995), *Consent Decree Order*, 11 FCC Rcd 14822 (1996); The Bell Atlantic Telephone Operating Companies, *Order to Show Cause*, 10 FCC Rcd 5099 (1995), *Consent Decree Order*, 11 FCC Rcd 14839 (1996).

921 47 U.S.C. § 272(d). *See also Accounting Safeguards Order*, 11 FCC Rcd at 17623-32, paras. 184-205; 47 C.F.R. § 53.209.

922 *See* 7 C.F.R. § 210.22 (requiring independent audits for participants in National School Lunch Program); 7 C.F.R. § 1209.39 (requiring independent audits of the Mushroom Promotion, Research, and Consumer Information Council); 7 C.F.R. § 1773.1 (requiring independent audits of electric and telephone borrowers from the Rural Utilities Service); 10 C.F.R. § 600.26 (requiring independent audits for Department of Energy grantees); 12 C.F.R. § 363.3 (requiring independent audits of the banking industry); 15 C.F.R. § 280.215 (requiring independent audits for accreditation of laboratories by National Institute of Standards and Technology); 24 C.F.R. § 85.26 (requiring independent audits of Housing and Urban Development grantees).

923 AICPA standards provide that independent auditors "should not only be independent in fact, but also should avoid situations that may impair the *appearance* of independence." American Inst. of Certified Pub. Accountants, ATTESTATION STANDARDS, AT § 100.26 (emphasis added); *see* American Inst. of Certified Pub. Accountants, INDEPENDENCE, AU § 220 ("Public confidence would be impaired by evidence that independence was actually lacking, and it might also be impaired by the existence of circumstances which reasonable people might believe likely to influence independence."); *see also* Alvin A. Arens and James K. Loebbeck, AUDITING: AN INTEGRATED APPROACH 82 (5th ed. 1991) ("If auditors are independent in fact, but users believe them to be advocates for the client, most of the value of the audit function will be lost.").

924 *See* Allegiance July 19 Comments at 3-4 (advocating Commission oversight).

925 Level 3 July 19 Comments at 4-6 (supporting public disclosure of the audit report).

505. Although the independent audit will provide a systematic means of evaluating SBC/Ameritech's compliance, we are aware of inherent limitations in the audit process.[926] Most notably, an independent audit does not guarantee discovery of noncompliance or illegal acts.[927] Because detection of noncompliance is not guaranteed, an auditor's report that fails to note any exceptions does not preclude an individual from filing a complaint with the Commission or the courts and a subsequent finding of noncompliance.[928] Finally, we stress that the independent auditor's failure to uncover noncompliance does not free SBC/Ameritech from its responsibility to ensure compliance with the conditions.

506. We decline to adopt commenters' suggestions that we establish a formal mechanism for participation in the audit process by state commissions and others.[929] The audit provisions contained under these conditions, however, are not implemented pursuant to section 272(d). We recognize that the state commissions have valuable insight into on-going issues and problems in the telecommunications industry,[930] and we stress that the Commission will work closely with the state commissions on an informal basis regarding SBC/Ameritech's compliance with these conditions. Pursuant to long-standing delegated authority, the Common Carrier Bureau may cooperate with state commissions by coordinating compliance and enforcement activities and sharing information gathered in the course of audits.[931] Moreover, we note that, under the conditions, SBC/Ameritech will ensure that the independent auditor provides access to its working papers to state commissions, thereby alleviating some concerns raised by the states.

507. Although the conditions establish clear deadlines for completing the audit planning and preparation work, and for submitting the independent auditor's report, some commenters raise concerns with the September 1 deadline, arguing generally that the submission

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926 AT&T July 19 Comments at 14; Sprint July 19 Comments at 61-62; Level 3 July 19 Comments at 4-6; Time Warner July 19 Comments at 4-5; GST/KMC/Logix/RCN July 19 Comments at 4-5; MCI WorldCom July 19 Comments at 60.

927 *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.28; *see also* U.S. GAO, GOVERNMENT ACCOUNTING STANDARDS § 4.17 (1999) ("The Yellow Book").

928 In light of these limitations, the Commission may, in its discretion, conduct targeted field audits of certain aspects of the conditions. *See* MCI WorldCom July 19 Comments at 60 (recommending that the Commission establish a procedure for resolving issues when a party disputes the independent auditor's findings).

929 TX Office of Public Utility Counsel Aug. 5 Comments at 11-12; Wisconsin PSC July 19 Comments at 5-6; IURC July 16 Comments at 6; Kansas Corp. Comm'n July 19 Comments at 1-2; Mich. PSC July 26 Reply Comments at 2. *See also* Time Warner July 19 Comments at 4-5; Covad July 26 Reply Comments at 27-30.

930 *See* 47 U.S.C. § 410(b) (authorizing the Commission to confer with state commission regarding telecommunications policy matters and "to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission").

931 *See* 47 C.F.R. § 0.291(b). To improve operating and administrative efficiency, the Commission delegated authority to the Common Carrier Bureau to coordinate compliance and enforcement activities with state commissions when: (i) there is a shared policy interest, and (ii) the states have processes for protecting confidential information. Amendment of Parts 0, 1, and 64 of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau, Report and Order, 5 FCC Rcd 4601 (1990); Delegation of Authority to the Chief, Common Carrier Bureau, *Memorandum Opinion and Order*, 50 Fed. Reg. 18487-03 (1985), on reconsideration, 104 FCC2d. 733 (1986).

deadline will provide a lengthy delay in learning about potential problem areas.[932] These concerns are addressed by the obligation to use AICPA standards, which require the independent auditor to perform procedures designed to identify additional information about SBC/Ameritech's compliance after the end of the relevant calendar year but before the submission of the final report.[933] In addition, we expect that the requirement for SBC/Ameritech to notify the independent auditor and the Commission of its on-going progress, as well as the other public disclosure requirements and the corporate compliance program, will ensure prompt and complete notification of potential problem areas. Furthermore, with respect to concerns regarding the timing of the independent audit of the advanced services affiliate provisions,[934] we note that under the conditions the implementation schedule is accelerated if the merger closing date occurs late in the calendar year.[935] Finally, the conditions establish a mechanism by which the Commission can evaluate the effectiveness of the audit program and determine the need for any modifications or improvements.

508. *Enforcement.* We have carefully evaluated the conditions to ensure that the Applicants have not proposed mere paper promises. We find that the corporate compliance program, independent audit, public disclosure requirements, and specificity of the conditions will ensure that these conditions produce meaningful and effective change. Despite some objection from commenters,[936] we find that that the conditions contain clear and specific language defining SBC/Ameritech's obligations, which will greatly facilitate compliance and enforcement efforts that may arise. The conditions also specify deadlines and implementation schedules for several of SBC/Ameritech's obligations. We recognize that our experience administering these conditions over time may reveal overlooked ambiguities. As with all of the Commission's regulations, we have the authority to interpret these conditions.[937] We plan to interpret any ambiguity in manner consistent with the underlying intent of the conditions and in accordance with our normal processes and procedures.

509. Several commenters urge the Commission to require satisfaction of all or most of the conditions prior to consummation of the merger.[938] Claiming that the merger is a reaction to current industry trends, the Applicants respond that further delay would drain the companies'

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[932] *See* MCI WorldCom July 19 Comments at 59-63. The conditions require the independent auditor to conduct its examination for each calendar year during which the conditions remain in effect.

[933] American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.49, 500.50, 500.51; *see also* American Inst. of Certified Pub. Accountants, SUBSEQUENT EVENTS, AU § 560.

[934] *See* Northpoint Aug. 19 *Ex Parte* at 2-3.

[935] By speeding up the implementation of the agreed-upon procedures audit, the conditions ensure that the Commission, state commissions, and the public will receive timely feedback concerning SBC/Ameritech's compliance with the advanced services affiliate provisions. Specifically, in the event that the merger closing date occurs after November 1, 1999, the independent auditor will conduct an agreed-upon procedures audit for the first six months after the merger closing date, and will submit a report no later than September 1, 2000.

[936] *See, e.g.,* Sprint July 19 Comments at 62, 67.

[937] *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Udall v. Tallman*, 380 U.S. 1 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

[938] *See, e.g.*, ALTS July 19 Comments at 3; Cable & Wireless July 19 Comments at 3-4; MCI WorldCom July 19 Comments at 3-7; Sprint July 19 Comments at 2; Time Warner Telecom July 19 Comments at 8.

business operations and impede strategic and day-to-day decision-making.[939] We have balanced these considerations and find that the conditions contain specific, concrete requirements which will facilitate post-merger enforcement. The conditions also require completion of certain tasks prior to consummation of the merger, which include: (1) filing a collocation tariff and/or offering to amend interconnection agreements to reflect standard terms and conditions for collocation; (2) incorporating separate advanced services affiliates, seeking necessary state certifications and approvals and negotiating and filing interconnection agreements between SBC/Ameritech incumbent LECs and their advanced services affiliates; (3) filing an OSS Process Improvement Plan with the Commission; and (4) engaging an independent auditor for the ten-month collocation audit and the first annual compliance review. A number of the obligations imposed upon SBC and Ameritech also take effect within 10 or 30 days of the merger's closing date. We find that the pre-merger obligations are adequate to ensure that SBC and Ameritech will have set in motion, prior to the merger, processes and actions that are necessary to bring the conditions to fruition in a speedy manner. Given the comprehensive enforcement mechanisms contained in the conditions, we also decline to require the merged firm to post a bond to ensure compliance with these conditions.[940]

510. *Sunset.* Some parties object that the three-year expiration of the Applicants' proposed conditions is inadequate,[941] and suggest that the conditions should remain in place as long as necessary to serve their intended purpose.[942] We note that in August the Applicants clarified their commitments to provide, in general, at least 36 months of benefit for each condition. We find that this three-year period of benefit is sufficient for this merger proceeding, given the rapidly changing telecommunications industry.[943]

511. *Effect of Conditions.* A common concern expressed by state commissions, competitors and several other parties is that the Applicants' commitments will set the bar for other state and federal proceedings, particularly ongoing or anticipated proceedings to implement sections 251 and 271 of the Act.[944] This is certainly not our intention; nor should these

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939 *See* SBC/Ameritech July 26 Reply Comments at 22-24.

940 *See* Covad July 22 Comments at 67-68 (seeking to have the Applicants post a $1 billion bond to ensure compliance); MCI WorldCom July 19 Comments at 32 (suggesting posting of $500 million bond for potential voluntary payments associated with OSS enhancements).

941 *See, e.g.,* Texas PUC Aug. 5 Comments at 2 (suggesting that "the three-year expiration of these conditions may not be sufficient time to ameliorate the market concentration concerns," but that, for other conditions, the interval "may give the incumbent carrier too much protection."); CoreComm July 22 Comments at 24-25 (suggesting five years are needed to cancel out the anticompetitive effects of the merger); Level 3 July 26 Reply Comments at 4-5 (suggesting a minimum 10-year period).

942 *See* Consumer Coalition July 19 Comments, Aff. at 12; Focal/Adelphia/McLeod July 19 Comments at 24-25 (suggesting biennial review of continuing need for conditions after five years); MCI WorldCom July 19 Comments at 9-10, 63-64 (suggesting periodic review of continuing need for conditions).

943 Like the Bell Atlantic/NYNEX proceeding, we also adopt a sunset provision in this matter. Here, most of SBC/Ameritech's obligations sunset after 36 months of benefit. Moreover, the conditions can be extended for any period in which SBC/Ameritech fails to comply with its obligations.

944 *See, e.g.,* BellSouth July 19 Comments at 1-4; AT&T July 19 Comments at 18 (predicting that Commission adoption of the submitted proposal would undermine ongoing efforts to implement and enforce existing state and

conditions have that effect. As explained above, the conditions that we adopt today are in no way intended to define what is required under, for example, sections 251 or 271, and SBC/Ameritech's compliance with these conditions does not signify that it will satisfy its nondiscrimination obligations under the Act or Commission rules. We emphasize that the performance measures that are part of this merger-related conditions package should not be viewed by states, BOCs, or competitors as sufficient, let alone optimal,[945] measures to demonstrate a BOC's compliance with section 271 or to satisfy the public interest standard in that context. Rather, these measures constitute a package of voluntary commitments proposed by the Applicants to resolve issues and concerns that are peculiar to this merger.[946]

512. Some parties also object to the paragraph in the Applicants' proposal that states that the expiration of a condition will not be considered in the Commission's public interest analysis of a section 271 application.[947] We note that these conditions are stand-alone obligations adopted as conditions to our approval of SBC/Ameritech's application to transfer licenses and lines. Provided that SBC/Ameritech complies fully with the letter and spirit of the conditions, the expiration of any obligation in accordance with the conditions will not affect other proceedings.

513. *Section 271 Approval Pre-Merger.* Several commenters in this proceeding, including the attorneys general of Indiana, Michigan, Missouri and Wisconsin, have suggested that we require SBC and Ameritech to obtain authorization to provide in-region, interLATA services in at least a majority of each company's in-region states prior to consummation of the merger.[948] According to these commenters, the section 271 approval process assures the Commission that SBC and Ameritech have sufficiently opened their local markets to competition. Requiring section 271 authorization pre-merger, these commenters claim, would have the benefit of being directly responsive to the competitive conditions that underlie the harms, while providing strong incentive for the companies to complete their market-opening

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federal rules); *id.* at 18, n.17 (stating that the ability of state regulators to obtain pro-competitive requirements "would be jeopardized by any indication that this Commission believes that requiring less of incumbent LECs is appropriate or desirable – which, rightly or wrongly, is the implication that would be drawn from approval of these conditions."); Texas PUC Aug. 5 Comments at 2 (expressing concern "that the Applicants' Proposed Conditions may be interpreted to supplant, rather than enhance, terms and conditions that have been previously adopted in Texas or in other states in which SBC and Ameritech operate.").

945 *See* AT&T July 19 Comments at 19 (fearing treatment of the conditions as if they reflected the Commission's view of the optimal set of requirements and enforcement measures to obtain compliance with the Act).

946 *See, e.g.*, SBC/Ameritech July 1 *Ex Parte* at 1-2; SBC/Ameritech July 26 Reply Comments at 95 ("The proposed Conditions were crafted to deal expressly with concerns raised about the merger; they were not proposed to address, expand, or supplement section 271 issues or concerns.").

947 *See, e.g.*, CoreComm July 22 Comments at 26; Level 3 July 19 Comments at 18.

948 *See* CoreComm July 22 Comments at 17-18; MCI WorldCom July 19 Comments at 7; NextLink/ATG July 19 Comments at 9; State Attorneys General Apr. 27 *Ex Parte* at 2, 32-33 (requesting section 271 approval in a majority of SBC and Ameritech states as a merger pre-condition). *See also* Consumer Coalition July 19 Comments at 2, Aff. at 11 (seeking a condition preventing SBC/Ameritech from applying for section 271 approval until the merger performance measurement plan becomes operational).

obligations imposed under the 1996 Act, and avoiding enforcement problems created by prior post-merger conditions.[949] The commenters also note that the Applicants, themselves, consider section 271 approval as a necessary prerequisite for success of their National-Local Strategy.[950]

514. Although imposing such a condition may provide the Commission with assurance regarding the openness of the Applicants' markets, we do not consider pre-merger section 271 approval to be the only means at the Commission's disposal in this merger proceeding to achieve a level of confidence that the Applicants have opened their market sufficiently and that the proposed transaction will advance the public interest. In the instant proceeding, we find that the Applicants have voluntarily submitted a set of conditions that suffice to demonstrate that the merger, on balance, will serve the public interest. We therefore decline to impose a pre-merger section 271 approval condition in this proceeding. Similarly, we reject the suggestion of some parties that we require SBC and Ameritech to demonstrate pursuant to section 271 that effective competition exists throughout its entire region, rather than in the state for which the company applied for section 271 authorization.[951]

515. *Level 3 Structural Split.* We also reject Level 3's request that we condition the merger on "planning" for loop divestiture, or a structural solution that isolates the BOCs from control of the local loops.[952] We find that the conditions contain adequate safeguards, such as requiring a separate affiliate for the provision of advanced services, that mitigate SBC/Ameritech's increased incentive and ability to discriminate against rivals as a result of the merger.

516. *Divestiture of Alarm Services.* We discuss in Section VIII.C below the Alarm Industry Communications Committee's (AICC's) claim that section 275 of the Communications Act requires Ameritech to divest ownership of its SecurityLink alarm services subsidiary to an independent, unaffiliated entity prior to the merger.[953]

517. *Enhanced Extended Links.* We decline to require SBC and Ameritech in this proceeding to offer enhanced extended links as an UNE.[954] We find that the legal, technical and policy implications of deeming enhanced extended links as UNEs are better addressed in the

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949 *See* State Attorneys General Apr. 27 *Ex Parte* at 32-33.

950 *See* State Attorneys General Apr. 27 *Ex Parte* at 32-33.

951 Focal Oct. 15 Comments at 17; Hyperion Oct. 15 Comments at 36; KMC Oct. 15 Comments at 23; Level 3 Oct. 15 Comments at 38.

952 Level 3 Comments at 36-37 (citing Petition of LCI Telecom Corp. for Declaratory Rulings, CC Docket No. 98-5 (filed Mar. 23, 1998) (proposing solutions involving divestiture of local loops to an independent company, or, in the alternative, operation of the loops by an independent company)). *See also* Level 3 July 19 Comments at 18-19 (similar).

953 *See* AICC July 19 Comments at 2-6.

954 *See, e.g.*, ALTS July 19 Comments at 22-23; Level3 July 19 Comments at 14; Consumer Coalition July 19 Comments at 2, Aff. at 19; CoreComm July 22 Comments at 20.

context of an industry-wide rulemaking.[955] Moreover, we note that some state commissions have required incumbent LECs to offer enhanced extended links.

518. *Other Conditions*. We also reject, as contrary to the 1996 Act, the request that we require the Applicants to resell voicemail services.[956] We also find it inappropriate to require the merged firm to affirmatively urge repeal of state legislative measures that prevent public power utilities from providing telecommunications services.[957] To the extent that other commenters suggest conditions aimed at curbing specific conduct on the part of SBC and/or Ameritech, such as winback, directory listings and paging practices or compliance with reciprocal compensation provisions,[958] we find that these concerns are best addressed in the context of enforcement proceedings.

VIII. OTHER ISSUES

A. Wireless Services

1. Wireless Service Offerings

519. Various subsidiaries of SBC hold commercial mobile radio service (CMRS) licenses. PBMS provides in-region personal communications services (PCS) and SWBW operates both in-region cellular and PCS franchises. SBMS provides out-of-region cellular

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955 *See* "FCC Promotes Local Telecommunications Competition," CC Docket No. 96-98, Report No. CC 99-41, Press Release (rel. Sept. 15, 1999).

956 *See* Ntegrity July 19 Comments at 15; Nat'l ALEC Assoc. Comments at 5-6 (suggesting that that the Commission require the Applicants to resell voice mail services).

957 *See* APPA July 19 Comments at 6-7; TX Rural Municipal Utilities July 19 Comments at 14 (suggesting that we require SBC to lobby in writing and testimony before Congress and the Texas Legislature to remove the prohibition against municipal electric utilities from providing telecommunications services in Texas).

958 *See* ALTS July 19 Comments at 28-29 (suggesting that the Commission prohibit SBC and Ameritech from trying to win customers back, or prevent them from changing carriers, using information that a competitive carrier has requested that customer's service records); *id.* at 29 (seeking SBC's and Ameritech's compliance with outstanding state orders to pay competitive LECs any reciprocal compensation due); Nat'l ALEC Assoc. July 19 Comments at 6-7; Ntegrity July 19 Comments at 10 (suggesting reforms of the Applicants' billing practices); Focal/Adelphia/McLeod July 19 Comments at 19 (requesting that SBC and Ameritech provide directory listing at cost-based prices and submit disputes to arbitration); PageNet July 19 Comments at 5-8; PCIA July 19 Comments at 2-5 (asking that the Commission require SBC to cease billing, and refund money to, messaging carriers for facilities it uses to deliver SBC-originated local calling traffic and to honor its interconnection obligations to messaging carriers); Power-Finder West July 19 Comments at 1 (requesting that the Commission require Ameritech to revise tariffs to eliminate 500 NXX code end-office activation charges); Ntegrity July 19 Comments at 13 (requesting that record order change be made uniform and lowered); Pilgrim July 19 Comments at 3 (asking the Commission to eliminate any SBC or Ameritech policy that restricts lawful content provided by a customer of a casual calling company and to require nondiscriminatory provision of billing and collection services, especially casual calling services); Hyperion July 19 Comments at 37 (requesting that SBC/Ameritech conduct remote call forwarding cut-overs at specific scheduled times, including after business hours, to avoid customer disruption); Nat'l ALEC Assoc. Comments at 4-5 (requesting that the Applicants be required to resell directory assistance blocking and directory assistance call completion blocking services throughout their regions).